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No.

IN THE
SUPREME COURT OF THE UNITED STATES

DARLIE KEY AND DARIN ROUTIER,
Petitioners,

v.

CITY OF ROWLETT, JIMMY RAY PATTERSON,
CHRIS FROSCH AND GREG DAVIS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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July 23, 2001

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## QUESTIONS PRESENTED

In furtherance of the criminal investigation of the murders of Damon Routier and Devon Routier, on June 14, 1996, Respondents Jimmy Ray Patterson ("Patterson") and Chris Frosch ("Frosch"), law enforcement officers employed by Respondent City of Rowlett, Texas ("Rowlett"), surreptitiously bugged the grave site conversations and prayers of Petitioners for over a fourteen-hour period. The bugging was conducted without a search warrant or court order, using a microphone hidden in an urn on the graves. The United States Court of Appeals for the Fifth Circuit upheld summary judgment in favor of all Respondents, holding that Petitioners had failed to meet their burden of proof under Fed. R. Civ. Proc. Rule 56 that their grave site conversations and prayers were uttered with an expectation of privacy. The Fifth Circuit held that Petitioners failed to negate the possibility that their interpersonal oral conversations and prayers were being electronically intercepted by law enforcement officers. Petitioners present the following questions:

1. Whether Petitioners' private interpersonal conversations and prayers at the grave site of family members were within the zone of privacy protected by the Fourth Amendment?

2. Whether the rights protected by the Federal Wire Electronic Communications Interception Act, 18 U.S.C. § 2511, *et seq.*, are coextensive with the Fourth Amendment?

3. Whether in a Rule 56 response to a Motion for Summary Judgment Petitioners are required to prove that they took precautions to ensure that law enforcement officers were not surreptitiously recording their private conversations and prayers at the grave site of family members in order to prove they enjoyed a reasonable expectation of privacy?

4. Whether it was it clearly established in June of 1996 that the Fourth Amendment and the Federal Wire Electronic Communications Interception Act, 18 U.S.C. § 2511, *et seq.*, required law enforcement officers to obtain a search warrant or court order before wiretapping the conversations of the Petitioners at the grave site of family members, thus depriving Respondents of qualified immunity?

5. Whether law enforcement officers enjoy qualified immunity in a civil suit brought pursuant to the Federal Wire Electronic Communications Interception Act, 18 U.S.C. § 2511, *et seq.*, where no statutory defense is available under the Act?

6. Whether *Monell's* "policy or custom" requirement and no *respondeat superior* defenses are applicable to an action under the Federal Wire Electronic communications Act, 18 U.S.C. § 2511, *et seq.* seeking civil damages or equitable relief?

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Petitioners, DARLIE KEE and DARIN ROUTIER, and Respondents, CITY OF ROWLETT, JIMMY RAY PATTERSON, CHRIS FROSCH and GREG DAVIS).

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## PETITION FOR WRIT OF CERTIORARI

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:**

DARLIE KEE and DARIN ROUTIER respectfully petition this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in *Darlie Kee, et al v. City of Rowlett, et. al.* decided on March 28, 2001, and reported at 247 F. 3d 206, affirming the decision of the United States Court for the Northern District of Texas that granted summary judgment in favor of Respondents.

## OPINIONS BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals, reported at 247 F. 3d 206 (King, Chief Judge, and Higgenbothom and Duhe, Circuit Judges), is attached as Appendix A. The Order denying petition for rehearing dated April 24, 2001, is attached hereto as Appendix B. The unreported order granting summary judgment for the Respondents Patterson, Frosch and Davis, the public officials, is attached hereto as Appendix C. The unreported order granting summary judgment for Respondent Rowlett is attached hereto as Appendix D. The unreported judgment of the district court is attached hereto as Appendix E.

## JURISDICTION

Petitioners seek review by writ of certiorari from the decision of the Fifth Circuit Court of Appeals entered March 28, 2001, and Order Denying Petition for Rehearing entered April 24, 2001. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254 (1) (1999).

The order granting summary judgment for the Respondents Patterson, Frosch and Davis, the public officials, was dated January 27, 1999. App. C. The order granting summary judgment for Respondent Rowlett was dated April 28, 1999. App. D. The Judgment of the district court, dated April 28, 1999, disposed of all claims and all parties, and hence constituted a final appealable order. App. E Appellants-Petitioners timely filed Notice of Appeal on May 11, 1999. App. at A7.

## TEXT OF CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES

UNITED STATES CONST., FOURTH AMEND. (1791): This Amendment is set forth in full at Appendix M1.

UNITED STATES CONST., FOURTEENTH AMEND. (1868): This Amendment is set forth in full at Appendix M1.

Pertinent provisions of the Federal Wire Electronic Communications Interception Act, 18 U.S. C. § 2511, *et. seq.* (The "Federal Wiretap Act") are attached hereto as Appendix M.

## STATEMENT OF THE CASE

### The Course of Proceedings

Petitioners filed a Complaint in the United States District Court for the Northern District of Texas (Dallas Division) on June 12, 1998, alleging deprivations of their Fourth and Fourteenth Amendment rights under color of state law, violations of the Federal Wiretap Act, 18 U.S.C. § 2511, *et. seq.*, and seeking declaratory,

injunctive and civil damages relief under 42 U.S.C. § 1983. Respondents answered the complaints of Petitioners and pled that the individual public officials should be granted qualified immunity and prosecutorial immunity. The Respondents immediately moved the court to stay all discovery due to the immunity defenses. The district court entered an order staying all discovery until the "immunity" issues were determined. Respondents then moved for summary judgment based upon the lack of a "reasonable expectation" that the oral conversations and prayers of the Petitioners were "private."

On January 27, 1999, the district court entered an order granting the Motions for Summary Judgment of Respondents Patterson, Frosch and Davis based upon the district court's conclusion that the Petitioners did not have a "reasonable expectation" of "privacy" at the grave site of deceased family members that "society" was prepared to recognize and that, therefore, the Fourth Amendment did not protect the Petitioners' interpersonal oral speech and prayers at a family grave site service. App. at C1. The district court entered an interlocutory judgment for the individual Respondents.

Respondent Rowlett then moved for summary judgment on the same grounds as the district court had previously granted summary judgment to Respondents Patterson, Frosch and Davis. The district court granted summary judgment to Respondent Rowlett. App. D1. On April 28, 1999, the district court entered final judgment as to all claims of the Petitioners against the Respondents. App. at E1.

On May 11, 1999, Petitioners timely filed their notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On March 28, 2001, the appeals court affirmed the district court's

decision in an opinion and judgment. A1. A petition for rehearing was timely filed on April 11, 2001, and was denied by the Fifth Circuit on April 24, 2001. B1.

Statement of Facts

On June 6, 1996, Damon Routier and Devon Routier, two minor children, were murdered in their home in Rowlett, Texas. A2. Respondents Patterson and Frosch, law enforcement officers for Respondent Rowlett were assigned to conduct an investigation into the murders. A2. On June 14, 1996, the children's deaths were mourned at the family's private prayer service at the grave site purchased and owned by the children's father, Petitioner Routier. A2. Without the knowledge or consent of Petitioners, Respondents, Patterson and Frosch, surreptitiously utilized an electronic eavesdropping device - a microphone placed in an urn near the grave site - to record fourteen (14) hours of oral conversation, sounds and prayers mourning the deaths of the children. Petitioners' oral prayers and mournings were intercepted and recorded by the bug. A3. The Respondents did not obtain a warrant or court order. A2.

The Respondents' affidavit in support of their Motion for Summary Judgment did not dispute the wiretap. F1 and G1. Respondents' affidavits did not recite what conversations, prayers or mournings of the Petitioners the government recorded during the fourteen hours and failed to offer evidence that Petitioners did not take ordinary precautions to ensure the private nature of their oral communications during the entire fourteen hours. Respondent Patterson's affidavit stated only that he *saw* "news reports on local television stations" of a "service" and that "videotapes" were aired. F3. Patterson did not testify to being present at the grave site

service on June 14th and did not testify that he reviewed the entire fourteen-hour recording of Petitioners' mournings and prayers. F1.

Respondent Frosch testified in his affidavit only that he "reviewed" the "videotape" of the surveillance and "saw" on the videotape "non-family members" and "media" at some point. G3. Frosch did not testify what conversations or prayers were recorded, who was present, when they were recorded, whose voices were recorded, or when the wiretap began and ended. G1. Neither Patterson's nor Frosch's affidavit attempted to imply or offer any evidence that they listened to the fourteen hours of recorded conversation, nor that the entirety of the speech recorded by the microphone occurred when the "media" and "non-family members" were present.

Petitioners' affidavits in response to Respondents' affidavits and Motions for Summary Judgment stated that only "specific individuals" "were invited" to attend the "private prayer service" and that "[t]he grave site service was not open to the public." H4. Further, "[n]o news reporters or other general public were invited or allowed to participate in the grave site service." H4. Petitioners' affidavits go on to state that they "...expected that [their] prayers to our God and our oral communications during this private time of grieving for the death of two children would be private" because the private moments "were conducted on private property where the family had purchased a burial site." H4. The Petitioners' affidavits testify that they "specifically requested that the public and news media not be present during the grave site service so that our prayers and conversations would be personal and private," and that the Respondents "were not invited to attend the burial services." H4.

The Petitioners' affidavits confirm that the Petitioners did not grant Respondents permission to bug the grave and were "shocked to learn" that the Respondents "had secretly placed microphones and electronic eavesdropping devices at the grave site service and had monitored electronically our conversations and prayers at the private service." H4. Petitioners reasonably "...anticipated and expected that [their] conversations at the grave site service would be a private matter between close family members and close friends of the family who had been invited to participate in the service. No outsiders or persons not associated closely with the family were invited to attend the grave site service." H4.

Petitioners' affidavits go on to confirm that "[n]o one, including the funeral home where the grave site services were conducted, permitted or agreed to the [Respondents'] electronic surveillance and search of the conversations made at the grave site service,"H5, and that the Respondents "...did not request permission to tape record or conduct electronic surveillance of the statements made by individuals at the grave site service." H5.

There is no evidence in the summary judgment record that the Petitioners knew or should have inferred that the Respondents intended on placing a microphone in the urn next to the burial plot of the children. There is no evidence in the summary judgment record that would lead a reasonably prudent person to believe that any law enforcement officers would even attempt to electronically record the private grieving of the Petitioners at the burial plot. The summary judgment record confirms that the Petitioners had no reasonable expectation that they should take any precautions against the possibility that the government would electronically record their private conversations and prayers at the burial site of the children.

The summary judgment evidence confirms, and the Respondents do not dispute, that the "surveillance" occurred and that the Respondents did not obtain a search warrant or court order permitting them to make the electronic recording. In fact, Respondents specifically intended to secretly record the "private moments" of the Petitioners as they mourned and grieved the death of their sons and grandsons. L3. Respondent Patterson testified about the intent and purpose of the electronic interception of Petitioners' oral conversations and prayers at the grave site:

Q. But you are here telling this Jury, that you folks put microphones there at the grave site to monitor the conversations of the other people who had gone there to pray, and to grieve at the passing of these two children?
A. Yes, sir.
Q. And recorded all of that?
A. Yes, sir.
Q. And this were hidden, so that the people couldn't find them — I mean, it was designed to be done surreptitiously was it not?
A. So that they couldn't — that they didn't see it, that's right.
Q. And you would record those *private moments*, is that right?
A. Yes, we did.
Q. Did you oh— who all knew about this besides you?
A. Detective Frosch.

Sworn testimony of Respondent Patterson on January 27, 1997 (emphasis added) App. at L3.

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI IS APPROPRIATE IN THIS CASE WHERE LAW ENFORCEMENT OFFICERS WITHOUT A SEARCH WARRANT OR COURT ORDER USED AN ELECTRONIC DEVICE (A MICROPHONE) TO RECORD THE PRIVATE CONVERSATIONS AND PRAYERS OF CITIZENS ATTENDING A PRIVATE BURIAL SERVICE FOR CLOSE FAMILY MEMBERS.

The Fifth Circuit's opinion and judgment specifically conflicts with this Court's holding in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), in which this Court held the party moving for summary judgment is entitled to judgment as a matter of law only if the "nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex, supra* at 323. The Fifth Circuit's judgment erroneously analyzes the affidavit testimony of the Petitioners filed in response to the Respondents' motions for summary judgment on the question of whether or not the Petitioners took reasonable precautions to ensure that their grieving and prayers would be private. The Fifth Circuit misapplied Rule 56 and this Court's decision in *Celotex* by presuming the Petitioners should anticipate that the government would covertly place a microphone in the urn next to the grave site to record the Petitioners' mourning and, thus, requiring the Petitioners to take precautions against the illegal conduct of law enforcement officers. How can Petitioners be charged with the presumption that the government will illegally bug the grave site without the Petitioners' knowledge or consent and then place the burden on Petitioners to offer evidence of precautions they took to avoid an unknown presumption? The Petitioners' summary judgment evidence, Appendices H - L, when

taken in light of the "reasonable inferences" that Rule 56 and this Court's precedent require, sufficiently established the requirements under the Fourth Amendment that first, Petitioners' expectation of privacy was one that society is willing to recognize and second, that Petitioners took reasonable precautions to protect the privacy of their oral conversations and prayers. *Bond v. United States*, 529 U.S. 334, 338 (2000); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979); and *Katz v. United States*, 389 U.S. 347, 360 (1967).

The decision below conflicts with other decisions interpreting the Federal Wiretap Act. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

James Madison addressed the basic dilemma of privacy in democratic governments in his FEDERALIST NO. 51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the difficulty lies in this: You must first enable the Government to control the govern; and in the next place, oblige it to control itself.

The legal definition of search began to take on a new meaning after this Court's decision in *Katz v. United States*, *supra*. Prior to *Katz*, the Court had held in *Silverman v. United States*, 365 U.S. 505 (1961), that overhearing a conversation through a common wall by means of a spike microphone that penetrated the wall was a Fourth Amendment search.

The *Katz* Court, per Justice Stewart, stated that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected....
>
> The Government stresses the fact that the telephone booth from which the petitioner made his calls [the place of the conversations] was constructed partly of glass so that he was as visible after he entered as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxi cab, a person in a telephone booth may be rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.
>
> ....Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any "technical trespass under... local property law".... Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people – and not simply "areas" – against unreasonable

> searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> ... The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus, constituted a "search and seizure" within the meaning of the Fourth Amendment.

*Katz, supra* at 352-356. This Court then held that the electronic eavesdropping, although apparently undertaken upon a "strong probability" that Katz was using the telephone in violation of federal law, was an unconstitutional search because the agents had not first obtained a search warrant.

One year after the *Katz* decision, electronic surveillance of the type at issue here came to be controlled by the adoption by Congress of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, which prohibits all wire tapping and electronic surveillance except pursuant to the specific procedures outlined in the statute. *See* 18 U.S.C.A. § 2511, M1-M13. Despite the adoption by Congress of specific statutes dealing with electronic surveillance, the *Katz* decision is still applicable to electronic surveillance of persons, not places, under the Fourth Amendment; and if electronic surveillance of a persons' words which could not otherwise be heard is to be employed, a warrant or court authorization is required.

The majority opinion in *Katz* does not, as Justice Harlan's concurring opinion states, require that a "person have exhibited an actual (subjective) expectation of privacy." The majority opinion did state, however, that "the government's conduct directed at

*Katz* violated the privacy upon which he *justifiably relied.*" (Emphasis added.) If Katz's oral communications in a public phone booth were subject to Fourth Amendment protection, as this Court held, and were protected from electronic surveillance by law enforcement officers, why are not the private prayers and mournings of Petitioners at the grave site of the two children not equally entitled to the protections of the Fourth Amendment? Respondent Patterson admitted that the purpose of placing the electronic bug in the urn at the grave site was to surreptitiously record the "private moments" of Petitioners. L3.

The decisions below conflict with other decisions of this Court and the other federal circuits which have held that a person's right of privacy is uniquely American and conflict with other federal circuits' decisions about the manner of applying the Fourth Amendment and the Federal Wiretap Act. The Fourth, Sixth, Ninth and Eleventh Circuits require a jury to determine the reasonableness of a search under the Federal Wiretap Act. The Fourth Circuit reversed summary judgment for the defendants in *Brown v. American Broadcasting Cos.*, 704 F. 2d 1296, 1305 (4th Cir. 1983), in which a broadcaster recorded a meeting between congressional investigators and the plaintiff with the consent of the investigators and held that the defendants' purpose in taping and broadcasting the meeting presented a factual issue for the jury. The Sixth Circuit held in *Boddie v. American Broadcasting Companies, Inc.*, 731 F. 2d 333 (6th Cir. 1984) that the reasonableness of the expectation of privacy was a question of fact for the jury where the plaintiff was caught on hidden camera by a news magazine discussing a judicial sex-for-leniency scandal.

> The record shows that Boddie was aware that she was speaking with reporters from ABC. But it remains an issue

> of fact for the jury whether Boddie had an expectation that the interview was not being recorded and whether that expectation was justified under the circumstances. The trial court's premature dismissal of the claim prevents us from holding that, as the Defendants contend, the evidence could not support such an expectation.

*Boddie, supra,* 731 F. 2d at 338-39.

The Ninth and Eleventh Circuits have similarly adopted standards that conflict with the Fifth Circuit. *See United States v. McIntyre,* 582 F. 2d 1221 (9th Cir. 1978); (city police chief and lieutenant bugged assistant chief's office; a reasonable expectation of privacy in the assistant chief's office space existed despite the fact that aural privacy was not complete.); *Walker v. Darby*, 911 F. 2d 1573, 1579 (11th Cir. 1990).

The right of privacy has been clearly enunciated by this Court and by many circuit courts and is well established as a constitutional right. *See Griswold v. Connecticut*, 381 U.S. 479 (1985); *Griffin v. City of Milwaukee*, 74 F.3d 824 (7th Cir. 1996); *Walker v. Darby, supra.* The Fifth Circuit decision conflicts with this Court's decisions which have held that searches conducted in violation of the Fourth and Fourteenth Amendments are actionable under the Civil Rights Act. *Monroe v. Pape*, 365 U.S. 167 (1961) (search of house without warrant); *Soldal v. Cook County*, 506 U.S. 56 (1992) (plaintiffs had a cause of action for unconstitutional seizure of their rented mobile home, alleging that sheriff's deputies had conspired with landlord to illegally remove trailer and evict them); and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (right of direct action under Fourth Amendment.

More than just a "right of privacy," Petitioners' case presents a question of the Respondents' conduct in violating the Fourth Amendment's protections from unreasonable searches without a warrant or court order. An unlawful search infringing upon either personal liberty or property rights creates a cause of action under the Civil Rights Act. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Likewise, the illegal recording of telephone conversations provides a basis for § 1983 liability of the law enforcement officers. *In re State Police Litigation*, 88 F.3d 111 (2d Cir. 1996) (material issues of fact precluded summary judgment where Plaintiffs alleged police had illegally taped-recorded conversations of pre-trial detainees). The Fifth Circuit decision below conflicts with decisions of these other federal circuits which have held that a warrantless search is *per se* unreasonable and cast upon the government the duty of producing evidence of an exception to the Fourth Amendment's warrant requirement. The Second and Sixth Circuits have placed the burden on the government to prove that the Plaintiff voluntarily relinquished the Plaintiff's constitutional rights by consenting to a search. *See Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991); and *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1994).

More importantly, however, just last year this Court held in *Bond, supra*, that a law enforcement officer's "physical manipulation of a petitioner's carry-on bag violated the Fourth Amendment's prescription against unreasonable seizures." This Court rejected the Fifth Circuit's holding in *Bond* that the defendant lost a reasonable expectation of privacy by exposing his travel bag to the public. *Bond, supra* at 338. Here, the underlying rationale of the Fifth Circuit – that Petitioners lost their "reasonable expectation" of privacy because of the "public nature" of the grave site service – was rejected last year in *Bond*. *Bond, supra* at 338.

The Court in *Bond* distinguished its decision in *California v. Ciraolo*, 476 U.S. 207, *supra*, and *Florida v. Riley*, 488 U.S. 445 (1989), because *Bond* involved a more intrusive inspection – tactile manipulation – than did the purely "visual inspection" in *Ciraolo* and *Riley*. Here, the nature of the intrusiveness into the personal privacy of Petitioners far exceeded the mere "physical manipulation" of a "travel bag," law enforcement officers intentionally intruded upon the most personal and "private moments" that could have possibly been envisioned by secretly intercepting and recording Petitioners' mourning and prayers concerning the murder of two young members of their family.

The Fifth Circuit opinion and judgment violates this Court's and other federal circuits' clearly established Fourth Amendment jurisprudence. The Fifth Circuit's decision requires Petitioners to 1) unreasonably anticipate that law enforcement officers will utilize electronic bugs to intercept their "private moments" during a private burial for family members; and, 2) offer summary judgment proof that Petitioners took precautions to protect their privacy from the government's unknown illegal act. The Fourth Amendment does not require our nation's citizens to presume that law enforcement officers will secretly use electronic equipment to intercept their most personal and private moments when grieving over the death of a family member. The decision below offends basic notions underlying the Fourth Amendment by requiring the Petitioners to presume illegal conduct of law enforcement officers and then take "ordinary precautions" to avoid the government's unknown violation of the law.

The decision below ignores American society's long history of expecting privacy during one's most revered and personal moments – while grieving over the loss of a close family member. Certainly,

the interpersonal oral grieving and prayers of the Petitioners over the murder of two children deserves the Fourth Amendment's highest expectation of privacy and it is, without doubt, a reasonable expectation which American society is not only prepared to recognize as reasonable but is demanded by the Fourth Amendment. The decision below assaults the basic premise of the Fourth Amendment that protects our citizens' most private and personal moments from the uninvited ear of government agents.

## II. CERTIORARI IS APPROPRIATE IN THIS CASE TO RESOLVE A SPLIT AMONG THE CIRCUITS CONCERNING THE PROPER APPLICATION OF THE FEDERAL WIRETAP ACT.

The decision below creates confusion and conflicting holdings with respect to the interpretation of the Federal Wiretap Act. The Fifth Circuit, without analysis of this Court's precedent or Congressional intent, presumes that the civil remedies of the Federal Wiretap Act and the Fourth Amendment are coextensive. A8-9, n.8. The Fifth Circuit's interpretation of the Federal Wiretap Act not only emasculates the privacy protections of the Act, but it creates a conflict within the circuits and lower courts to such an extent that the fundamental right of citizens to be free from government intrusion by wiretap into their private speech will be substantially at risk if the decision is allowed to stand. The Fifth Circuit's decision conflicts with this Court's decisions interpreting the Federal Wiretap Act. *Bartnicki v. Vopper*, ____U.S. ____, 121 S. Ct. 1753 (2000); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Dalia v. United States*, 441 U.S. 238 (1979); *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. New York Tel. Co.*, 434 U.S. 159 (1977); *United States v. Donovan*, 429 U.S. 413 (1977); *United States v. Giordano*, 416 U.S. 505

(1974); *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. United States Dist. Court for Eastern Dist. Of Mich.*, 407 U.S. 297 (1972); and *Alderman v. United States*, 394 U.S. 165 (1969).

The Fifth Circuit opinion held that the statutory claims arising under the Federal Wiretap Act are "predicated [by the Petitioners] on enjoying a reasonable expectation of privacy in these oral communications." A8. The Court below held that the "Fourth Amendment determination of a reasonable expectation of privacy and the federal wire tap analysis overlap." A9, n.8. The decision below then concluded that, in any civil action brought under the Federal Wiretap Act, a plaintiff must prove 1) a "reasonable expectation of privacy which society is prepared to recognize;" and 2) that he took precautions to protect his conversations from the presumption that the government would secretly record his "private moments."

The decision below errs in concluding that the Federal Wiretap Act is coextensive with the Fourth Amendment. The Federal Wiretap Act was specifically adopted by Congress to deal with the electronic interception of oral communications, and nothing in the Act's history, language or definitions leads to the conclusion that Petitioners must prove as an element of their course of action that they took ordinary precautions to avoid a covert recording of their conversations by law enforcement officers of which the Petitioners had no knowledge. In truth, the mere fact that the law enforcement officers were required to use a hidden microphone to record the oral communications in and of itself, without more, establishes that the Petitioners had a reasonable expectation that their oral communications were private. The Federal Wiretap Act presumes that any time the government must use an eavesdropping device to

intercept an oral communication, the communication must have been intended to be private. *See Mitchell, infra.* To require a citizen to prove that he took actions to avoid an unknown "bug" of his oral communications in order to establish a violation of the Federal Wiretap Act is contradictory to the foundation of the Act. What was the purpose of the Federal Wiretap Act if it was not to establish that if the government must covertly record a citizen's conversations by using an electronic interception device that the presumption must be that the citizen intended those conversations to be private?

The evidence in this record establishes that the conversations which were recorded were done so by a covert act of the law enforcement officers. The information which was obtained by the law enforcement officers was not recorded because the Petitioners broadcast their prayers and grieving to the world, but, rather, the means to record the Petitioners' "private moments" was through the covert bugging of the grave. The Fifth Circuit's analysis of the privacy interests at stake and the applicability of the Federal Wiretap Act creates confusion among the lower courts and the substantial risk of misapplication of the Fifth Circuit's erroneous decision to interfere with the basic fundamental right of Americans to be free from the government's clandestine conduct. This Court should grant Petitioners' writ not only to correct the clearly erroneous opinion of the Fifth Circuit but to ensure that the protections afforded to citizens of this country by the Federal Wiretap Act are not emasculated. This case presents the Court with an opportunity, for the first time, to offer guidance to the Nation on the proper application of the Federal Wiretap Act's civil remedies to law enforcement's covert use of a bug to record clearly "private moments" of our citizens.

The Fifth Circuit decision failed to address this Court's landmark decision in *Mitchell v. Forsyth,* 472 U.S. 511, in which this Court discussed at length the history of federal wiretaps and the adoption by Congress of the Federal Wiretap Act. *Mitchell* confirmed this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (*Keith*) that "the Fourth Amendment does not permit the use of warrantless wiretaps [even] in cases involving domestic threats to national security," *Mitchell, supra* at 514, and that "electronic surveillance unaccompanied by any physical trespass constituted a search subject to the Fourth Amendment's restrictions, including the Warrant Clause." *Mitchell, supra* at 530, *citing Katz, supra.* The *Mitchell* court viewed this Court's decision in *Katz* as holding that "no recognized exceptions to the warrant requirement could justify warrantless wiretapping in an ordinary criminal case." *Mitchell, supra* at 531. If "*Keith* finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to national security," *Mitchell, supra* at 534, and *Katz* held that there was "no recognized exception to the warrant requirement" which could justify "warrantless wiretapping in an ordinary criminal case," *Katz, supra,* how then could the Fifth Circuit and the lower courts possibly conceive of the notion that Respondents were entitled to qualified immunity for wiretapping the "private moments" of the Petitioners at the grave site of the murdered children?

The mere fact that the law enforcement officers were forced to result to technological enhancements to hear the Petitioners' communications at the grave site is sufficient to prove, in and of itself, that the Petitioners' utterances and prayers were entitled to the protection, not only of the Fourth Amendment, but more importantly, of the Federal Wiretap Act. To require the Petitioners to prove more than the fact that the law enforcement officers were

forced to use electronic devices to intercept their communications is to go beyond what the Federal Wiretap Act contemplated.

The judgment of the Fifth Circuit conflicts with the clear history, language and intent of the Federal Wiretap Act and creates confusion among the lower courts which will result in irreparable injury to the speech of this nation's citizens to such an extent that this Court, rather than risking the continued irreparable injury caused by the government's interception of private communications, should grant this writ and reverse the judgment below. A clear split among the federal circuits exists on the issue of the proper standard of proof for civil actions brought under Federal Wiretap Act. *See Brown, supra; Boddie, supra; McIntyre, supra; and Darby, supra.* The conflicts between the circuits as to the proper application of *Katz, Mitchell, Keith*, the Fourth Amendment and the Federal Wiretap Act suggests that this Court should grant the Petitioners' writ to clarify the proper application of civil actions brought under the Fourth Amendment and the Federal Wiretap Act for interceptions of oral communications by the government.

This Court's decision in *Katz*, one year prior to the adoption of the Federal Wiretap Act, established that even non-trespassory electronic eavesdropping which picks up only one end of a telephone conversation is a "search." Prior to the adoption of the Electronic Surveillance Act, in *Silverman v. United States*, 365 U.S. 505, a unanimous Court held that listening to conversations within a house by inserting a "spike mike" into a party wall and making contact with a heating duct serving the house, "thus converting their entire heating system into a conductor of sound," amounted to an illegal search. Later, in the *per curiam* opinion of *Clinton v. Virginia*, 377 U.S. 158 (1964), this Court held that a mechanical listening device stuck into the wall of an apartment

adjoining the citizens, although only as slight as a "thumb tack," in which electronic surveillance was undertaken constituted an unlawful "search." As early as 1972, in *United States v. United States Dist. Court for the Eastern District of Michigan*, *supra*, this Court held that unauthorized electronic surveillance to gather intelligence for domestic security purposes was prohibited by the Fourth Amendment. The Court stated:

> [P]rior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with reasonable standards as the Congress may proscribe.

The focus of this Court after *Katz* was not upon the "place" where the search occurred but rather upon the "protected speech" of the citizen and whether or not the law enforcement officers intended to electronically obtain what would otherwise be personal and private speech. What if Katz, instead of going to a private telephone booth, had walked through Central Park in New York with his friend and had a private conversation with his friend which was electronically recorded using electronic surveillance devices by law enforcement officers? What if instead of having a "door" on the telephone booth Katz had engaged in his conversation over the telephone in a voice that could not otherwise be heard except by the electronic surveillance? What if Katz had left the door to the telephone booth open but had spoken in a hushed voice so that his words could not be otherwise heard by anyone outside the booth? What if Katz, instead of going to the telephone booth had gone with an associate to his favorite restaurant and asked for his favorite table located in a secluded alcove where no one else could hear the conversation except for Katz and his associate? Would it not be a

"search" in violation of the Fourth Amendment and the Federal Wiretap Act for law enforcement officers to "bug" Katz's table?

The use of artificial means to overhear a conversation which law enforcement officers are not in a position to discover by use of the naked ear should be deemed to be a Fourth Amendment search regardless of the intention of the citizen and a violation of the Federal Wiretap Act. *See* Kitch, *Katz v. United States*: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133, 139-140. This is so because,

> [A]n expectation of privacy will be reasonable if in a given context it is one normally shared by people in that setting and at the same time falls within some tolerance level which represents the limit of what society can accept given its interests in law enforcement.
>
> As applied to the typical eavesdropping case, however, the first half of this test would always appear to be satisfied. Electronic eavesdropping by its very nature is meant to be secret and undetectable. Indeed, it depends for its efficacy on the very fact that it violates the normal expectation that one can rely on his senses to warn him when someone is in hearing range. Whether the conversation takes place at home, in a private office or in a more public place such as a phone booth or a restaurant, as long as the conversants appeared to be secluded they will not expect to be overheard. Hence, if this were the test of whether a justifiable expectation of privacy has been invaded, the conclusion would seem to follow that all secret electronic eavesdropping constitutes a Fourth Amendment intrusion.

*The Supreme Court, 1967 Term*, 82 Harv. L. Rev. 93, 192 (1968).

Title III of the 1968 Omnibus Crime Control and Safe Streets Act was designed to protect the privacy of wire and oral communications but also to allow law enforcement officers to obtain evidence for "certain types of major offenses." Law enforcement electronic surveillance of conversations, in accordance with the Act, is thus prohibited except under a court order, which a judge may issue after being convinced that specific procedural requirements have been met. The Act prohibits and finds unlawful the interception of any oral communication by the use of any electronic, mechanical, or other device except in specific limited circumstances and in accordance with specifically proscribed procedures stated within the Act. 18 U.S.C. § 2515. An "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The word "intercept" means the aural acquisition of the content of any wire, electric, or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4). The terms "electronic, mechanical, or other device" means with very limited exceptions, "any device or apparatus which can be used to intercept a wire, oral, or electronic communication." 18 U.S.C. § 2510(5).

The Act is intended to proscribe at least as much as is forbidden by the Fourth Amendment. While the Fourth Amendment does permit the employment of modern technology in criminal law enforcement, third-party electronic monitoring, subject only to the self-restraint of the government, is not what the founding fathers or the Fourth Amendment intended. In order to correct the clearly

erroneous decision of the Fifth Circuit and to establish a national framework for application of the Federal Wiretap Act's civil remedies provisions, the Court should grant this writ.

## III. CERTIORARI IS APPROPRIATE IN THIS CASE WHERE THE LOWER COURTS HAVE INTERPRETED QUALIFIED IMMUNITY AS AN APPLICABLE DEFENSE TO A CIVIL ACTION BROUGHT PURSUANT TO THE FEDERAL WIRETAP ACT SEEKING CIVIL DAMAGES AND EQUITABLE RELIEF.

The decisions below create an erroneous view of qualified immunity and will create confusion and conflict among the courts below about the scope and application of the qualified immunity defense to the Federal Wiretap Act. Qualified immunity should not be afforded to Respondents Patterson and Frosch because it was clearly established in June of 1996 that the Federal Wiretap Act protected the oral communications of citizens which were intercepted by law enforcement officers using electronic or mechanical devices, and the Respondents did not follow the clearly established procedures in the Act to obtain court approval of their electronic surveillance. The decisions below create confusion and conflict among the circuits as to the application of the qualified immunity doctrine to the Federal Wiretap Act by presuming that the Act is not intended to protect the interpersonal oral communications and prayers of the Petitioners made during a private family burial service. Review of the decisions below and the application of the qualified immunity defense should be granted in order to clarify the application of the qualified immunity defense to oral communications of citizens occurring in situations in which society presumes that they intended that their communications would be a private matter. The lower courts' judgments create

confusion and will encourage law enforcement officers to disregard the procedural safeguards and mechanisms of the Federal Wiretap Act and of this Court's jurisprudential history of interpretations under the Fourth Amendment.

This case presents the Court with the clear opportunity to give direction and guidance to the circuits of the proper applicability of the qualified immunity defense to the Federal Wiretap Act where law enforcement officers intercept, not by the unaided ear, but rather by the use and employment of electronic surveillance and eavesdropping devices, the "private moments" of citizens. What possible rationale do the lower courts use to conclude that the conduct of the Respondents was "objectively reasonable?" Respondent Patterson admitted in sworn testimony that his intent was to record the "private moments" of the family members at their private burial service. The law enforcement officers knew that what they were doing would infringe upon the Petitioners' privacy and yet they did not even consider obtaining the necessary authorizations required by the Federal Wiretap Act.

The language and history of the Federal Wiretap Act do not support the lower courts' conclusions that qualified immunity applies here. The Court should grant Petitioners' writ in order to clarify how and when qualified immunity applies to civil damages and equitable relief sought pursuant to the Federal Wiretap Act. Since 1982, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), law enforcement officers have been aware of the standards for qualified immunity.

> We... hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate

> clearly established statutory or constitutional rights of which a reasonable person would have known.

*Harlow, supra*, at 818 [citations omitted].

This Court's focus in *Harlow*, and the question of whether the legal principle involved was clearly established appears to undermine any claim that a lack of a clear factual precedent may be the basis for an immunity defense, at least where the legal principle governing the case was narrowly defined and clearly established prior to the officials' conduct. *See Mitchell, supra.* Nothing in *Harlow* suggests that qualified immunity should be applied to the Petitioners' action under the Federal Wiretap Act for equitable relief. In fact, *Harlow*, by its very language, limits the qualified immunity defense, under Section 1983, to only "civil damages." Clarification of the proper application of the qualified immunity defense would greatly assist the lower courts in the application of this defense limited to only civil damages under Section 1983. The Fifth Circuit decision below creates conflict in the area of Fourth Amendment search cases. For instance, claims that the conduct involved had not been previously proscribed and that, thus, qualified immunity should apply have been soundly rejected. *See, e.g., Buenrostro v. Collazo*, 973 F.2d 39 (1st Cir. 1992) (no qualified immunity for warrantless entry); *see also Brown, supra; Boddie, supra; McIntyre, supra;* and *Darby, supra.*

The proper application of the qualified immunity defense pled by the Respondents in response to a claim of a violation of the Federal Wiretap Act for interception of private oral communications is unclear in the case law of the federal circuits. This Court should grant certiorari in order to clarify the conflict among the circuits about the proper application of qualified

immunity in the context of whether it is applicable as a defense to a statutory civil action brought under the Federal Wiretap Act where law enforcement officers have utilized an electronic device to intercept oral communications of citizens that society clearly holds to be intended to be private.

Numerous courts have denied qualified immunity where a reasonable officer would not believe that probable cause existed to conduct a search or to make an arrest. *See, e.g., Canteen v. Eight Unknown Officers*, 15 F.3d 587 (6th Cir. 1994); *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994); *Taylor v. Farmer*, 13 F.3d 117 (4th Cir. 1993); *Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993); *Scott v. Gulmac*, 3 F.3d 163 (7th Cir. 1993); *Frantz v. Lytle*, 997 F.2d 784 (10th Cir. 1993); *Rivera v. Murphy*, 979 F.2d 259 (1st Cir. 1992); *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992); *Ricci v. Urso*, 974 F.2d 5 (1st Cir. 1992); and *Conner v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990). The Fifth Circuit's judgment below conflicts with these interpretations of the qualified immunity defense.

Even in the context of the Fourth Amendment where the legal standard itself prohibits a certain type of government intrusion, claims that the conduct involved had not been previously proscribed and that qualified immunity should thus be granted have been routinely rejected. No qualified immunity has been awarded to the Defendants who have engaged in illegal searches and seizures unless there is probable cause, exigent circumstances, or a warrant or court order issued allowing the search and seizure. *See, e.g., Buenrostro, supra* at 973 F.2d 39; *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993); *Walsh v. Franco*, 849 F.2d 66 (2nd Cir. 1988); *Vaughan v. Ricketts*, 859 F.2d 736 (9th Cir. 1988); *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988); *Weber v.*

*Dale*, 804 F.2d 796 (2d Cir. 1986); *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986); and *Smothers v. Gibson*, 778 F.2d 470 (8th Cir. 1985). The decisions below conflict with these other federal circuit decisions.

## IV. CERTIORARI IS APPROPRIATE IN THIS CASE WHERE THE LOWER COURTS HAVE APPLIED *MONELL'S* RULE IN AN ACTION BROUGHT UNDER THE FEDERAL WIRETAP ACT SEEKING THE RECOVERY OF STATUTORY REMEDIES OF CIVIL DAMAGES AND EQUITABLE RELIEF.

The "policy or custom" and non-*respondeat superior* requirements of *Monell* are inapplicable as defenses to a violation of the Federal Wiretap Act. The Fifth Circuit and the district court presumed that this Court's restriction on the recovery of civil damages in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), is equally applicable as a defense to a civil action for damages and equitable relief under the Federal Wiretap Act and, therefore, that the Petitioners must prove a violation of the Act occurred as the result of a "policy or custom" of Respondent Rowlett and that Respondent Rowlett is not liable for civil damages under the Federal Wiretap Act under a theory of *respondeat superior*. This Court has never applied *Monell* and its restrictive requirements to a civil action for relief under the Federal Wiretap Act. The lower courts are in conflict and confusion as to the applicability of *Monell* to the recovery of civil damages against political subdivisions pursuant to any statute other than 42 U.S.C. § 1983, *e.g.*, Title VII (42 U.S.C. §§ 2000e *et seq.*

The application of *Monell*, based upon its policy considerations of protecting the financial resources of local governments and the

legislative intent of § 1983, do not apply to recovery of equitable relief under the Federal Wiretap Act. This Court has previously never reviewed the applicability of *Monell* to a request for equitable relief from a local government. This Court should grant the writ on this question in order to end the confusion in the lower courts and to give direction to the lower courts as to the applicability of *Monell*, if at all, to other federal statutes which provide for the recovery of civil damages and equitable relief against political subdivisions.

## CONCLUSION

Important national issues are at stake in this case. The applicability of the Fourth Amendment to oral communications which society clearly believes are intended to be private are affected by the lower courts' decisions. The creation of a proper framework for the recovery of civil relief under the Federal Wiretap Act is compelling. The Fourth Amendment presumes that certain speech and oral communications are intended to be private and beyond the purview of the government's interception with the aid of enhanced technological devices. The protections afforded by the Fourth Amendment and the Federal Wiretap Act go far beyond what the lower courts understood.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

*Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting) (quoted approvingly in *Stanley v. Georgia*, 394 U.S. 557, 564 (1972)).

Petitioners Darlie Kee and Darin Routier suggest that the instant case is a prime example of abuses of the constitutional rights of American citizens. Petitioners respectfully request that their petition be granted, and that certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision in *Darlie Kee, et. al. v. City of Rowlett, et. al.*, and that this Honorable Court decide the issues raised herein.

Respectfully submitted,

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No. 99-10555

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

247 F.3d 206

March 28, 2001, Decided

Before KING, Chief Judge, and HIGGINBOTHAM and DUHE, Circuit Judges.

[*208]

KING, Chief Judge:

Plaintiffs-Appellants Darlie Kee and Darin Routier appeal the district court's grant of summary judgment in favor of Defendants-Appellees the City of Rowlett, police officers Jimmy Ray Patterson and Chris Frosch, and Assistant District Attorney Greg Davis. The district court held that the placement of an electronic surveillance microphone at an outdoor grave site memorial service, which intercepted Kee and Routier's communications, did not violate constitutional or statutory rights and therefore did not provide a predicate for their claims under 42 U.S.C. § 1983 and 18 U.S.C. § 2511. The district court reasoned that Kee and Routier failed to demonstrate that they possessed a reasonable expectation of privacy regarding their oral communications at the grave site memorial service. For the following reasons, we AFFIRM.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 1996, Darlie Kee ("Kee") and Darin Routier ("Routier") attended a grave site memorial service for Damon Routier and Devon Routier, two minor children who were murdered on June 6, 1996 in Rowlett, Texas. Kee was the grandmother of the deceased children. Routier was the father of the deceased children. Darlie Routier, the children's mother, was convicted of capital murder for the children's deaths.

Jimmy Ray Patterson and Chris Frosch, police officers in the City of Rowlett (the "City"), were assigned to investigate the murders. As part of the investigation, an electronic surveillance wiretap was placed n1 in a funeral urn in close proximity to the children's graves. The officers did not obtain a judicial warrant or court order, nor did they obtain the family's consent before placing the surveillance device at the grave site. However, the officers did obtain permission from the owners of the cemetery to enter and conduct their surveillance.

> n1 There is some discrepancy in the record regarding whether Patterson and Frosch were directly responsible for the actual placing of the wiretap in this location. Both Patterson and Frosch state, in their affidavits submitted in support of their summary judgment motion, that they were aware of the investigation into the Routier children's murder. Both claim, however, that they had circumscribed roles in the direct surveillance activities. In contrast, Kee and Routier allege that Patterson admitted under oath in the state criminal trial of Darlie Kee that he was the lead investigator on the case and that he was involved in planning the surveillance. Furthermore, Kee and Routier

point to Frosch's affidavit in which he admitted to obtaining an urn from the cemetery owners, which he understood would be used in the surveillance. Frosch also admitted to discussing the surveillance with the owners of the cemetery.

The district court did not determine the extent of Patterson and Frosch's involvement, finding that even if Patterson and Frosch were involved in the surveillance, no constitutionally significant expectation of privacy was violated. We proceed in similar fashion.

The grave site at issue was a privately owned plot of land situated in an outdoor and publicly accessible cemetery. The electronic surveillance device consisted of a [*209] microphone planted in an urn, which recorded sounds and conversations at the grave site. The microphone recorded the surrounding sounds of the grave site for approximately fourteen hours. Police also videotaped the activities at the grave site.

Due to the notoriety of the murders and the subsequent investigation, the news media and public were aware of the planned memorial service. News reporters from local television stations and newspapers attended and observed portions of the activity at the grave site. Family members, including Kee and Routier, and other invited guests participated in services, prayers, and conversations at the grave site. The summary judgment evidence fails to detail exactly how many people attended the grave site, who was in attendance, whether there was more than one memorial service during the day, when the media observers were present, and what conversations were recorded. n2

n2 Because the district court stayed discovery until the qualified immunity issues were determined, the factual record is limited.

The existence of the surveillance recordings was first discovered by Kee and Routier during the capital murder trial of Darlie Routier. At the trial, Patterson testified to the placement of the microphone surveillance device at the grave site. Patterson also testified that the device was placed in the urn beside the grave site "in case someone went up there and made a confession about what happened." Upon learning about the existence of the surveillance recordings, Kee and Routier brought suit against those individuals and entities allegedly involved in the taping of their conversations.

The complaint sought damages, attorneys' fees, and a declaratory judgment against Patterson and Frosch; Greg Davis, the Assistant District Attorney assigned to the case; and the City (collectively, the "defendants"). The focus of the complaint was limited to those communications and prayers directed toward the deceased children. Specifically, Kee and Routier sought damages from Patterson, Frosch, and Davis under 42 U.S.C. § 1983, alleging violations of rights under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures, and alleging violations of the constitutional right to privacy emanating from the general protections of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Kee and Routier also sought damages under 18 U.S.C. § § 2510-2522 n3 for violation of the federal statutory law that prohibits illegally intercepting oral communications n4 without a warrant. Kee and Routier sought damages from the [*210] City under 42 U.S.C. § 1983, alleging that the City failed to properly supervise and train the officers as to the applicable law, and that this failure was a deliberate and intentional act of indifference. Finally, Kee and

Routier sought declaratory relief requesting that the actions of the defendants be declared unconstitutional.

> n3 Kee and Routier claimed a violation of 18 U.S.C. § 2511. Section 2511 provides in relevant part: "(1) Except as otherwise specifically provided in this chapter any person who[:] (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication ... shall be punished ... or shall be subject to suit." 18 U.S.C. § 2511(1)(a) (2000).
>
> In general, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 ("Federal Wiretap Act"), "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Forsyth v. Barr,* 19 F.3d 1527, 1534 (5th Cir. 1994) (quoting *Gelbard v. United States,* 408 U.S. 41, 48, 33 L. Ed. 2d 179, 92 S. Ct. 2357 (1972)).

> n4 Section 2510 defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2).

In three separate motions, the defendants moved for summary judgment. n5 The district court held that Kee and Routier had not demonstrated that they had a subjective expectation of privacy in their conversations and prayers at the grave site. Further, the district court held that even if Kee and Routier could establish a subjective expectation of privacy, the district court was not prepared to recognize this expectation as objectively reasonable. Finally, the district court found that even if Kee and Routier could demonstrate a subjective and objectively reasonable expectation of privacy, defendants were entitled to qualified immunity on the claims. Because the predicate constitutional violation could not be demonstrated, the district court dismissed all of the constitutional and statutory claims against the defendants.

> n5 Patterson and Frosch moved for summary judgment on the ground that Kee and Routier had failed to demonstrate that a constitutional right had been violated. In the alternative, Patterson and Frosch invoked qualified immunity, arguing that no reasonable police officer would have believed that the officers' actions would have violated the constitutional rights of Kee and Routier.
>
> Davis moved for summary judgment on the ground that Kee and Routier could not allege an actionable federal claim against him personally, because they could not directly connect him to supervising or administering the electronic surveillance. Davis also invoked absolute and qualified immunity because he alleged his actions were taken pursuant to his prosecutorial duties.
>
> The City moved for summary judgment on the ground that Kee and Routier could not

> demonstrate that they had a constitutionally protected reasonable expectation of privacy and that Kee and Routier could not demonstrate that the City maintained a policy, practice, or custom that authorized its police officers to violate the reasonable expectation of privacy of its citizens.

Kee and Routier timely appeal the grants of summary judgment.

## II. STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmovant. *Smith v. Brenoettsy,* 158 F.3d 908, 911 (5th Cir. 1998)*; see also Tolson v. Avondale Indus., Inc.,* 141 F.3d 604, 608 (5th Cir. 1998). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (quoting FED. R. CIV. P. 56(c)). The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. "If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995). "A dispute over a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Smith,* 158 F.3d at 911 (quoting

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 [*211] (1986)). The substantive law determines which facts are material. *See Anderson,* 477 U.S. at 248.

III. REASONABLE EXPECTATION OF PRIVACY

The dispositive issue in Kee and Routier's complaint is whether the secret electronic recording of their private prayers and conversations directed at their deceased relatives violated their reasonable expectation of privacy. Their Fourth Amendment and "right to privacy" claims rest on the assumption that they had a constitutionally protected reasonable expectation of privacy regarding their oral communications at the outdoor grave site. n6 Their statutory claims, arising under 18 U.S.C. § 2511, also are predicated on enjoying a reasonable expectation of privacy in these oral communications. n7 In similar fashion, the defendants' motions for summary judgment and defenses of qualified immunity are based on the fact that Kee and Routier cannot demonstrate that they ever possessed a reasonable expectation of privacy at the grave site upon which to base their constitutional and statutory claims. We approach both the constitutional and statutory claims under essentially the same analysis, asking whether Kee and Routier can demonstrate a reasonable expectation of privacy. Accordingly, our analysis necessarily focuses on this precise question. n8

> n6 Specifically, Kee and Routier's complaint alleges violations of the Fourth and Fourteenth Amendments: "The Fourth and Fourteenth Amendments protect Plaintiffs from Defendants' unlawful search and seizure. The conduct of Defendants infringes upon the Plaintiffs' personal liberty and privacy rights."

In addition, they allege infringement of their right to privacy under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments: "The Constitution of the United States protects the Plaintiffs from the Defendants indiscriminate invasion in both their conduct and in their speech. The rights of Plaintiffs to grieve and mourn the loss [of] their close relatives at a grave site service raises very dear and close personal matters which are private and which involve family relationships and are thus protected. The Plaintiffs had a reasonable expectation of privacy during the private grave site funeral and prayer services for Damon and Devon Routier which was violated, without warrant or court order, by the Defendants' conduct described herein."

n7 Kee and Routier's complaint alleges "the conduct of the Defendants as described [in the complaint] constitutes a violation of 18 U.S.C.A. § 2511, et. seq., chapter 119--Wire and Electronic Communications Interception and Interception of Oral Communications as set forth in Title 119 of the United States Code Annotated. The Defendants' conduct as described herein is an unlawful interception and/or disclosure of an oral communication as prohibited by 18 U.S.C.A. § 2511, et. seq." We note that the district court did not specifically address Kee and Routier's § 2511 claims.

n8 In the instant case, the Fourth Amendment determination of a reasonable expectation of privacy and the federal wiretap analysis

> overlap. 18 U.S.C. § 2510(2) protects oral communications "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The legislative history of this section demonstrates that Congress intended this definition of oral communication to parallel the reasonable expectation of privacy test set out in *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). *See* S. REP. NO. 90-1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2178; *United States v. Turner,* 209 F.3d 1198, 1200 (10th Cir. 2000); *United States v. McKinnon,* 985 F.2d 525, 527 (11th Cir. 1993).

A. Reasonable Expectation of Privacy in Oral Communications

"The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California* [*212] *v. Ciraolo,* 476 U.S. 207, 211, 90 L. Ed. 2d 210, 106 S. Ct. 1809 (1986) (quoting *Katz v. United States,* 389 U.S. 347, 360, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Harlan, J., concurring)); *see also Smith v. Maryland,* 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979) ("Consistently with *Katz,* this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."). Following the *Katz* standard, n9 "our Fourth Amendment analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he [sought] to

preserve [something] as private. ... Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Bond v. United States,* 529 U.S. 334, 338, 146 L. Ed. 2d 365, 120 S. Ct. 1462 (2000) (citations and internal quotations omitted). Therefore, in order to establish a constitutionally protected reasonable expectation of privacy, Kee and Routier must demonstrate both that they had an actual expectation of privacy, based on a showing that they sought to preserve something as private (which we call a subjective expectation of privacy), and that their expectation of privacy is one that society recognizes as reasonable (which we call an objective expectation of privacy).

> n9 *Katz* involved a factual situation in which government agents eavesdropped on conversations in a telephone booth by means of an electronic listening device attached to the top of the booth. *See* 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

The district court relied on *United States v. Cardoza-Hinojosa,* 140 F.3d 610, 615 (5th Cir. 1998), to find that Kee and Routier did not demonstrate a subjective expectation of privacy in their public oral communications. Cardoza-Hinojosa addressed whether an individual who owned a free-standing shed, which he claimed was used to operate a part-time welding business, had a reasonable expectation of privacy in that structure sufficient to support Fourth Amendment standing to object to the search of the structure. The court effectively focused on the subjective expectation of privacy component of the test and determined that, under the facts of the case, the defendant did not have a subjective expectation of privacy in the shed and, thus, lacked standing to raise a Fourth Amendment challenge.

Despite the differing, non-real property context of the

instant case, the district court adopted the five-factor test set out in *Cardoza-Hinojosa* and applied it to the prayers and conversations at the public grave site. The *Cardoza-Hinojosa* factors to determine an expectation of privacy include: (1) "whether the defendant has a [property or] possessory interest in the thing seized or the place searched," (2) "whether he has a right to exclude others from that place," (3) "whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion," (4) "whether he took normal precautions to maintain privacy," and (5) "whether he was legitimately on the premises." *Id.* (quoting *United States v. Ibarra,* 948 F.2d 903, 905 (5th Cir. 1991)). n10 While we find these factors informative, we ultimately conclude that they provide an imprecise framework to judge an individual's [*213] subjective expectation of privacy in the context of oral communications.

> n10 Like *Cardoza-Hinojosa*, Ibarra involved the question whether defendants had standing to contest the search of a physical structure, specifically a house. *See Ibarra,* 948 F.2d at 906.

Our difficulty in applying the *Cardoza-Hinojosa* factors to oral communications is that a subjective expectation of privacy in oral communications may, but does not necessarily, turn on the physical characteristics of the place or property in which the speech takes place. In fact, Katz clearly shifts the constitutional protection beyond conceptions based on property to focus on the individual's privacy interests. *See Katz,* 389 U.S. at 351 ("The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be

constitutionally protected." (citations omitted)); *see also United States v. Jackson,* 588 F.2d 1046, 1052 (5th Cir. 1979) ("No matter where an individual is, whether in his home, a motel room, or a public park, he is entitled to a 'reasonable' expectation of privacy." (citing *Katz,* 389 U.S. at 359) (Douglas, J., concurring)).

Thus, while appropriate to determine the expectation of privacy in the context of searches of physical real property, the *Cardoza-Hinojosa* factors fail to engage the more difficult questions arising from oral communications, especially those communications that occur in areas accessible to the public. *See Katz,* 389 U.S. at 352 ("What [*Katz*] sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen."); *see also United States v. Smith,* 978 F.2d 171, 179 (5th Cir. 1992) ("Courts should bear in mind that the issue is not whether it is conceivable that someone could eavesdrop on a conversation but whether it is reasonable to expect privacy."). To be clear, our concern with the district court's determination is simply one of emphasis; we find that the third and fourth factors, namely whether Kee and Routier "exhibited a subjective expectation of privacy that [their communications] would remain free from governmental intrusion" and whether they "took normal precautions to maintain privacy" are the dispositive considerations in the context of the public conversations and prayers at issue in this case. n11

> n11 Applying the *Cardoza-Hinojosa* factors to the factual situation in *Katz* demonstrates the appropriateness of this shift in emphasis. For example, *Katz* had a negligible property or possessory interest in the telephone booth; did not have an enforceable right to exclude others from the property; and while legitimately on the

> premises, did not gain an expectation of privacy from that position. Instead, the constitutional protections stemmed from the fact that he subjectively expected his conversations to be private and that he took the normal precautions available to him to call from inside a booth.

In explicating these two factors, we are guided by analogous cases involving the reasonable expectation of privacy afforded to oral communications in the eavesdropping and wiretap contexts. Primarily, courts have looked to considerations such as (1) the volume of the communication or conversation n12; (2) the [*214] proximity or potential of other individuals to overhear the conversation n13; (3) the potential for communications to be reported n14; (4) the affirmative actions taken by the speakers to shield their privacy n15; (5) the need for technological enhancements to hear the communications n16; and (6) the place or location of [*215] the oral communications as it relates to the subjective expectations of the individuals who are communicating. n17 We agree that these considerations help us develop, but do not define, a set of nonexclusive factors to evaluate the subjective expectation of privacy in oral communications in publicly accessible spaces. n18 *See O'Connor v. Ortega,* 480 U.S. 709, 718, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) (recognizing in the context of work environments that determinations of a "reasonable expectation of privacy must be addressed on a case-by-case basis"); *United States v. Smith,* 978 F.2d 171, 180 (5th Cir. 1992) ("Any determination of the reasonableness of an individual's expectation of privacy is necessarily fact intensive."). Having determined a more appropriate framework to analyze the facts before us, we turn to the instant case.

> n12 *See, e.g., United States v. Smith,* 978 F.2d 171, 177 (5th Cir. 1992) (citing *United States v.*

*Burns,* 624 F.2d 95, 100 (10th Cir. 1980), for the proposition that a loud conversation in hotel room that could be heard in adjoining rooms precluded a finding of a reasonable expectation of privacy); *Walker v. Darby,* 911 F.2d 1573, 1579 (11th Cir. 1990) (finding a question of fact, sufficient to defeat summary judgment, in whether defendant's conversations were electronically intercepted in a manner that invaded a reasonable expectation of privacy); *United States v. Agapito,* 620 F.2d 324, 329 (2d Cir. 1980) (finding that conversations loud enough to be heard by others in an adjoining room to undermine a reasonable expectation of privacy); *Wesley v. WISN Div.- Hearst Corp.,* 806 F. Supp. 812, 814 (E.D. Wis. 1992) (finding evidence that plaintiffs talked in "hushed voices" or "ceased speaking altogether, to avoid being overheard" relevant to determine reasonable expectation of privacy); *Kemp v. Block,* 607 F. Supp. 1262, 1264 (D. Nev. 1985) (finding no reasonable expectation of privacy because plaintiff argued in a loud voice that could be overheard by coworkers).

n13 *See, e.g., In re John Doe Trader Number One,* 894 F.2d 240, 243 (7th Cir. 1990) (finding no reasonable expectation of privacy for comments made on the trading floor of the Chicago Mercantile Exchange because of the large number of people present); *Kemp,* 607 F. Supp. at 1264 (finding that the presence of coworkers undermined any reasonable expectation of privacy); But *see Burns,* 624 F.2d at 100 (reasoning that *Katz* could

reasonably assume that "uninvited ears" were not listening ... "because the unimpaired vision that attends use of a transparent phone booth afforded him the reasonable conclusion that no listener was in the vicinity"); *United States v. McIntyre,* 582 F.2d 1221, 1224 (9th Cir. 1978) (finding reasonable expectation of privacy in conversations that took place in an office, even though the door to the office was open and coworkers were present).

n14 *See, e.g., United States v. White,* 401 U.S. 745, 749, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971) (finding that individuals take the risk that their conversations will be reported to authorities); *Hoffa v. United States,* 385 U.S. 293, 302, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society." (internal quotations and citations omitted)); *United States v. Longoria,* 177 F.3d 1179, 1183 (10th Cir. 1999) (concluding that defendant "had no reasonable expectation that the person in whose presence he conducts conversations will not reveal those conversations to others. He assumed the risk that the informant would reveal his incriminating statements to law enforcement."); *see also John Doe Trader Number One,* 894 F.2d at 243; *McIntyre,* 582 F.2d at 1224.

n15 *See, e.g., Katz,* 389 U.S. at 363, n* (White, J., concurring) ("As the Court

emphasizes the petitioner 'sought to exclude the uninvited ear.'"); *Smith,* 978 F.2d at 177 ("While it is true that the right to privacy in a personal conversation is generally a reasonable expectation, the actions of the parties to the conversation may reduce this expectation to the point that it is no longer 'reasonable'"); *see also, e.g., Dorris v. Absher,* 179 F.3d 420, 424 (6th Cir. 1999) ("The conversations took place only when no one else was present, and stopped when the telephone was being used or anyone turned onto the gravel road that was the only entrance to the office. The record thus indicates that the employees took great care to ensure that their conversations remained private."); *Kemp,* 607 F. Supp. at 1264 ("The subjective expectation of privacy may be tested by any outward manifestations by the plaintiff that he expected his discussion with Mr. Roy in the instrument shop to be free from eavesdroppers. A comparison of what precautions he took to safeguard his privacy interest with the precautions he might reasonably have taken, is appropriate.").

n16 Compare *Jackson,* 588 F.2d at 1051 ("Employing the privacy interest analysis approved in *Katz,* we hold that these appellants had no justifiable expectations of privacy with respect to their motel room conversations which were audible to the unaided ears of the government agents lawfully occupying an adjoining room."); *John Doe Trader Number One,* 894 F.2d at 244 ("The Supreme Court has long held that an agent can record those

conversations which he can hear with his unaided ear."), and *Kemp,* 607 F. Supp. at 1264 ("One of the tests used is to ascertain whether the defendant overheard the communication with the naked ear under uncontrived circumstances."), with *Agapito,* 620 F.2d at 330 n.7 ("The absence of electronic eavesdropping of course is significant. As Justice Brennan has pointed out: There is a qualitative difference between electronic surveillance ... and conventional police strategems such as eavesdropping." (citations and internal quotations omitted)), *United States v. Eschweiler,* 745 F.2d 435, 437-38 (7th Cir. 1984) (interpreting Agapito to "suggest that an undercover agent who uses amplifying equipment to overhear conversations in other rooms that would have been inaudible to his naked ear invades interests protected by the Fourth Amendment"), and *United States v. Mankani,* 738 F.2d 538, 543 (2d Cir. 1984) ("The Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement.").

The Court in *Katz* recognized this tension. On one hand Justice Harlan explained that persons having "conversations in the open could not be protected from being overheard," but that same person holding a conversation in a telephone booth did have a reasonable expectation not to have that conversation electronically "intercepted." *See Katz,* 389 U.S. at 361 (emphasis added).

n17 *See,* e.g., *Minnesota v. Carter,* 525 U.S.

83, 88, 142 L. Ed. 2d 373, 119 S. Ct. 469 (1998) ("The Fourth Amendment protects people, not places. But the extent to which the Fourth Amendment protects people may depend upon where those people are." (citations and internal quotations omitted)); *Mankani,* 738 F.2d at 542 ("Of course, the fact that people are protected does not mean that place has no bearing on one's reasonable expectation of privacy. Plainly it does. Those who claim their privacy has been unlawfully invaded do not live in a vacuum."); *Burns,* 624 F.2d at 100 ("Legitimate privacy expectations cannot be separated from a conversation's context. Bedroom whispers in the middle of a large house on a large, private tract of land carry quite different expectations of privacy, reasonably speaking, than does a boisterous conversation occurring in a crowded supermarket or subway."); *McIntyre,* 582 F.2d at 1224 (finding "[a] business office need not be sealed to offer its occupant a reasonable degree of privacy"); *see also, e.g., United States v. Harrelson,* 754 F.2d 1153, 1169-70 (5th Cir. 1985) (finding no legitimate expectation of privacy for conversations held in a prison setting); *United States v. McKinnon,* 985 F.2d 525, 528 (11th Cir. 1993) (holding that defendant did not have a reasonable expectation of privacy for communications initiated in the back seat of a police car).

n18 Therefore, as was discussed in oral argument, while two federal judges may have a reasonable expectation of privacy in a hushed

> conversation on the courthouse steps, they might lose that expectation of privacy if they spoke loudly, if they were surrounded by people who could eavesdrop, if one of the judges reported the conversation to authorities, if either party otherwise took actions that would expose the confidentiality of their communications, or if they failed to take any affirmative steps to shield their privacy.

B. The Failure to Demonstrate Sufficient Facts to Establish a Subjective Expectation of Privacy

Under the summary judgment standard, Kee and Routier must demonstrate that a genuine issue of material fact exists as to their reasonable expectation of privacy in their oral communications. "Although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the [*216] nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial." *Rushing v. Kansas City S. Ry. Co.,* 185 F.3d 496, 505 (5th Cir. 1999). Applying the nonexclusive framework set out in Part III.A, we find that Kee and Routier have failed to meet this burden, because they have provided insufficient evidence in their affidavits and pleadings to show that they had a subjective expectation of privacy.

In their affidavits, Kee and Routier assert that their "grieving conversations and statements" and "oral prayers and communications to ourselves and our God" should be private and not subject to government wiretaps. These statements, alone, cannot sustain the weight of Kee and Routier's burden in establishing that they had a subjective expectation of privacy. *See Lawrence v. Univ. of Tex. Med. Branch,* 163 F.3d 309, 311-12 (5th Cir. 1999) ("The non-moving party must go

beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Neither unsubstantiated assertions nor conclusory allegations can satisfy the non-moving party's burden." (citations, footnote, and internal quotations omitted)).

For example, Kee and Routier adduced no evidence regarding the context of the communications that they now seek to characterize as private. They do not argue that the prayers were hushed or that their voices were modulated to protect their conversations from "uninvited ears," and they have provided no information about the tone, volume, or audibility of the private communications directed toward the graves. They do not specify which conversations were conducted in a manner inaudible to others and provide no information about who was present and to whom their conversations were directed. As knowledge of these important facts is well within the control of Kee and Routier, the failure to include this information in their affidavits undermines any claim of an expectancy of privacy.

In similar fashion, Kee and Routier do not assert that their oral statements were communicated free from the possibility of eavesdroppers who might have been in close proximity to the grave site. In fact, the defendants have submitted evidence to demonstrate that the grave site services were attended by representatives of the media and that third parties were in close proximity to the grave site. Kee and Routier simply fail to respond to this argument that potentially would eviscerate a subjective expectation of privacy. Furthermore, they provide us with no particularized information regarding their activities vis-a-vis the other people known to be at the cemetery and, thus, fail to provide information necessary to find that they had a subjective expectation of privacy. n19

n19 Following the nonexclusive factors set out

> in Part III.A, we note that there is no allegation that anyone at the grave site service reported the incident to authorities. This consideration is, therefore, irrelevant to our analysis.

Perhaps most damaging to Kee and Routier's argument is that they failed to present evidence demonstrating any affirmative steps taken to preserve their privacy. While it is apparent from their affidavits that they did not expect government agents surreptitiously to be recording their prayers, they also were aware that the service was being conducted in an outdoor setting. Kee and Routier fail to allege that they took any steps to ensure that unwanted individuals were excluded or that they did anything to preserve the private nature of the service. They point to no reasonable safeguards or common-sense [*217] precautions taken to preserve their expectation of privacy.

The strongest argument presented by Kee and Routier is that the surveillance was accomplished through the use of technological enhancements. This is a case in which the information possibly was not audible to the "unaided ear." *See United States v. Jackson,* 588 F.2d 1046, 1052 (5th Cir. 1979). n20 This is also a case in which the use of technological enhancements potentially could reveal "intimate details." *See United States v. Ishmael,* 48 F.3d 850, 855 (5th Cir. 1995) ("The crucial inquiry, as in any search and seizure analysis, is whether the technology reveals 'intimate details.'" (quoting *Dow Chem. v. United States,* 476 U.S. 227, 238, 90 L. Ed. 2d 226, 106 S. Ct. 1819 (1986))). Despite these factors, however, for Kee and Routier to meet the burden at the summary judgment stage they must demonstrate more than the fact that technology was used for surveillance purposes. They also must show that a factual question exists as to a violation of their subjective expectation of privacy due to that technology. While this possibility may be increased when technological

enhancements such as wiretaps are used, the vague affidavits put forth in support of this contention are insufficient in the case at hand.

n20 See supra note 16.

Finally, Kee and Routier provide almost no information regarding the physical layout or location of the grave site where the prayers or conversations took place. For example, no information is provided about the privately owned burial plot in relation to the rest of the cemetery. Kee and Routier have presented no information regarding the grave site's proximity to the entrance of the cemetery, or regarding whether the public was prevented from accessing the grave site or whether the grave site was secluded by other graves or natural objects, such as trees or bushes. In contrast, the defendants assert that the conversations took place in the open air of a publicly accessible cemetery and that there were no barriers to prevent individuals, such as the assembled media and onlookers, from observing the activities. n21 Again, Kee and Routier have failed to meet their summary judgment burden to demonstrate that an issue of material fact exists as to whether their subjective expectation of privacy was violated.

n21 The fact that the prayers and conversations took place in an outdoor publicly accessible space is a difficult hurdle for Kee and Routier to overcome. While neither party briefed the issue, we note a possible overlap between the "open fields" doctrine, which is well-established in Fourth Amendment jurisprudence and the instant case. However, the open fields doctrine has not been expanded beyond observational searches. *See Husband v. Bryan,* 946 F.2d 27, 29 (5th Cir. 1991) ("Neither this

> court nor the Supreme Court have extended the open fields doctrine to anything beyond observation searches."); *Allinder v. Ohio,* 808 F.2d 1180, 1184 (6th Cir. 1987); but *see United States v. Ishmael,* 48 F.3d 850, 855 (5th Cir. 1995) (applying open fields doctrine to observation based on thermal imaging technology). We decline to engage the issue without briefing, but simply note that *Katz* supports an argument that the fact of visual observation does not necessarily control the reasonableness of the privacy expected for oral communications. In short, the open fields approach cannot automatically be adopted for use in the oral communications context. The openness of the place where the oral communications are spoken, however, may be a significant factor countenancing against finding a reasonable expectation of privacy.

Because we agree with the district court that no subjective expectation of privacy was established on the facts presented, we affirm the grants of summary judgment. As such, we do not reach the question whether individuals such as Kee or Routier [*218] could have an objectively reasonable expectation of privacy at a grave site burial service under different facts or whether the individual defendants would have qualified immunity in such a situation. Further, because our holding rests on Kee and Routier's failure to demonstrate their subjective expectation of privacy, we do not reach the question whether, in other circumstances, officers would be required to obtain judicial approval for a wiretap pursuant to 18 U.S.C. § 2511.

## IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment in favor of all defendants.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-10555

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DARLIE KEE; DARIN ROUTIER

Plaintiffs - Appellants
v.

CITY OF ROWLETT, JIMMY RAY PATTERSON, CHRIS FROSCH, GREGG DAVIS, Assistant District Attorney for Dallas County

Defendants - Appellees

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Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before KING, Chief Judge, and HIGGINBOTHAM and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

[Signed by Carolyn D___ King]

_____

United States Circuit Judge
[Signed April 24, 2001]

CLERK'S NOTE:

REHG-2

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MADATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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DARLIE KEE and
DARIN ROUTIER,

Plaintiffs,

v. No. 3:98-CV-1372-T

CITY OF ROWLETT,
TEXAS, et a.,

Defendants.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DECLARING MOOT OBJECTIONS

Before the Court is the motion for summary judgment filed by Defendants Chris Frosch and Jimmy Ray Patterson and the motion for summary judgment filed by Defendant Greg Davis. The motions are opposed. After considering the motions, the responses, and the replies, the Court is of the opinion that the motions should be granted.

Plaintiffs filed their complaint on June 12, 1998, alleging that Defendants violated their civil rights under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and illegally intercepted and disclosed oral communications in violation of 18 U.S.C. § 2511, *et. seq.*

Essentially, Plaintiffs allege the following facts. They were attending a private prayer service with friends and family members at the grave site of Damon and Devon Routier, Darin Routier's sons and Darlie Kee's grandsons. Defendants Patterson and Frosch, who were investigating the deaths of Damon and Devon Routier, placed hidden microphones near the grave site during the private prayer service. Defendants engaged in audio and video surveillance of Plaintiffs during the prayer service without permission from Plaintiffs and without a warrant. Defendant Greg Davis, an Assistant District Attorney assigned to the investigation of the Routier deaths, knew of and approved the surveillance.

Plaintiffs seek recovery under 42 U.S.C. § 1983 for the alleged violations of their right to privacy and for violation of 18 U.S.C. § 2511, *et seq.* They also seek to hold the City of Rowlett responsible for the actions of Patterson and Frosch, and for failing to train its police officers. With the instant motion, the individual defendants seek summary judgment on Plaintiffs' claims against them.

Defendants claim that they are entitled to summary judgment because there is no evidence that they were personally involved in the surveillance at the grave site. Defendants Patterson and Frosch also argue that Plaintiffs had no reasonable expectation of privacy and they are entitled to immunity. Similarly, Davis argues that he is entitled to absolute and qualified immunity.

Summary judgment should be entered only where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C). The movant bears the burden of establishing the propriety of summary judgment. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that

there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *See id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the moving party. *See id.*

Plaintiffs must show personal involvement on the part of Defendants to succeed on their § 1983 claims. *See Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983). However, as Plaintiffs point out, the Court has stayed discovery pending the resolution of the immunity issues. Plaintiffs cannot present any additional evidence of personal involvement without discovery. Therefore, the Court will deny without prejudice Defendants' motion for summary judgment based on the lack of personal involvement, and will address the remaining summary judgment issues.

All of Plaintiffs' claims stem from an alleged violation of their right to privacy. *See e.g., Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965) (recognizing the penumbra of rights created by the several constitutional amendments, including the right to privacy). To succeed on their claims, Plaintiffs must have had a reasonable expectation of privacy at the grave site. *See e.g. United States v. Cardoza-Hinojosa*, 140 F.3d 610, 613-614 (5th Cir. 1998) (stating that a reasonable expectation of privacy is required to establish a violation of Fourth Amendment); *Walker v. Darby*, 911 F.2d 1573, 1578 (11th Cir. 1990) (stating that a reasonable expectation of privacy is required to establish a violation of federal law). Patterson and Frosch first argue that Plaintiffs had no reasonable expectation of privacy at the grave site.

In deciding whether a person has a reasonable expectation of privacy, the Court looks to (1) whether the person has a property or possessory interest in the thing seized or the place searched; (2) whether he has a right to exclude others from the place; (3) whether he has exhibited a subjective expectation of

privacy that it would remain free from governmental intrusion; (4) whether he took normal precautions to maintain privacy; and (5) whether he was legitimately on the premises. *See Cardoza-Hinojosa*, 140 F.3d at 615 (citing *United States v. Ibarra*, 948 F.2d 903, 906 (5th Cir. 1991)). No one factor is necessarily decisive, but together they represents the concerns the Court should address in deciding whether a person has a reasonable expectation of privacy. *See Cardoza-Hinojosa*, 140 F.3d at 616.

The summary judgment evidence shows that Plaintiffs had a property interest in the particular burial site and that they were there legally. However, Plaintiffs did not own the cemetery in which the burial site is located, or the several surrounding burial sites. Additionally, the cemetery is open to the public and there is no evidence that Plaintiffs could exclude anyone from the cemetery.

More importantly, Plaintiffs failed to take normal precautions to maintain privacy. The evidence shows that Plaintiffs invited friends and family members to the grave site for the prayer service.[1] Plaintiffs' statements were made in an open cemetery, there were no barriers, and it was readily accessible to the public.

Finally, the only evidence that Plaintiffs had a subjective expectation of privacy is their statements to that effect. In analyzing the subject expectation factor, however, the Court should focus on whether the person took normal precautions to maintain his privacy. *See United States v. Briones-Garza*, 680 F.2d 417, 422-23 n.5 (5th Cir. 1982) (stating that, absent an admission by the person that

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[1] Defendants state in their affidavits that even they were invited to the service. They also state that local media members were invited, and that they attended and filmed the service. Plaintiffs state that only friends and family members were invited to the service, and that Defendants were never invited. For purposes of this motion, the Court accepts Plaintiffs' version of these facts.

he did not have an expectation of privacy, the better course for the court is to focus on the objective aspects of whether he took normal precautions to maintain his privacy). Here, the circumstances under which the Plaintiffs conducted their prayer service indicates that they had no expectation of privacy.

Even if Plaintiffs did have a subjective expectation of privacy in meeting at the cemetery, the Court is of the opinion that the expectation is not one which society is prepared to recognize as reasonable. *See Cardoza-Hinojosa*, 140 F.3d at 614. Accordingly, Plaintiffs have no standing to claim an invasion of their right to privacy, and their claims should be dismissed.

Assuming Plaintiffs established a reasonable expectation of privacy at the cemetery, the Court nevertheless concludes that the individual defendants are entitled to qualified immunity. In analyzing a claim of qualified immunity, the Court must first determine whether Plaintiffs have alleged a violation of a clearly established federal right. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991). Second, the Court must determine whether Defendants' actions were objectively reasonable in light of the clearly established law outlining the specific contours of the federal right. *See Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

The Court has concluded that Plaintiffs had no reasonable expectation of privacy at the cemetery, and that they therefore have not alleged a violation of a clearly established federal right. Assuming Plaintiffs had a reasonable expectation of privacy under the circumstances, the Court is of the opinion that Defendants' are nevertheless entitled to qualified immunity because their actions were objectively reasonable.

A defendant is entitled to qualified immunity if reasonable public officials would differ on lawfulness of the defendant's actions. *See Campbell v. City of San Antonio*, 43 F.3d 973, 977 n.6 (5th Cir. 1995). A defendant is entitled to immunity even if he

reasonably but mistakenly believes that his actions were lawful, even though an actual constitutional violation may have occurred. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

As noted above, Plaintiffs' statements were made in a cemetery with public access. They could not exclude others from the cemetery, and friends and family members were present. The Court concludes that reasonable public officials in these circumstances would not be certain that conducting surveillance at the grave site would violate Plaintiffs' rights. Accordingly, Patterson, Frosch, and Davis are entitled to qualified immunity.

The Court notes that it did not rely on those portions of Plaintiff's summary judgment evidence to which Defendants object. Accordingly, Defendants' objections to the evidence are moot.

It is therefore **ORDERED** that the Motion for Summary Judgment filed by Defendants Patterson and Frosch on November 13, 1998, is **granted**.

It is **FURTHER ORDERED** that the Objections to Plaintiffs' Summary Judgment Appendix, filed by Defendants Patterson and Frosch on January 11, 1999, are **declared moot**.

It is **FURTHER ORDERED** that the Motion for Summary Judgment filed by Defendant Davis on November 19, 1998, is **granted**.

It is **FURTHER ORDERED** that the Objections to Plaintiffs' Exhibits, filed by Defendant Davis on December 13, 1998, are **declared moot**.

It is **FURTHER ORDERED** that Plaintiffs' claims against Defendants Patterson, Frosch, and Davis are **dismissed with prejudice**.

Signed this 27th day of January, 1999.

[Signed]

Robert B. Maloney
U. S. District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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DARLIE KEE and
DARIN ROUTIER,

Plaintiffs,

v. No. 3:98-CV-1372-T

CITY OF ROWLETT,
TEXAS, et a.,

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Before the Court is the Motion for Summary Judgment filed by Defendant City of Rowlett, Texas. The Court assumes the motion is opposed, but no response has been filed and the time to do so has passed. After consideration, the Court is of the opinion that the motion should be granted.

Plaintiffs bring this action under 42 U.S.C.§1983 alleging the Defendants violated their constitutional right to privacy. On January 27, 1999, the Court granted the individual defendants' motion for summary judgment, finding that no constitutional violation occurred. Defendant City of Rowlett now moves for summary judgment.

Summary judgment should be entered only where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C). The movant bears the burden of establishing the propriety of summary judgment. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *See id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the moving party. *See id.*

Here, the Court has previously determined that no constitutional violation occurred. Without an underlying constitutional violation, the City is not liable in a §1983 action based on the same alleged conduct. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *Bodzin v. City of Dallas*, 768 F.2d 722, 726 (5th Cir. 1985). Accordingly, the City's motion should be granted.

The City also requests costs and attorney's fees pursuant to 42 U.S.C.§1988. While the City is entitled to costs under Federal Rule of Civil Procedure 54(c), whether to allow attorney's fees under §1988 is within the discretion of the Court. *See* 42 U.S.C. §1988(b). The Court is of the opinion that the request for fees should be denied.

It is therefore **ORDERED** that the Motion for Summary Judgment filed by Defendant City of Rowlett, Texas, on March 23, 1999, is **granted**.

It is **FURTHER ORDERED** that Defendant's request for attorney's fees is **denied**.

Signed this 28th day of April, 1999.

[Signed]

Robert B. Maloney
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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DARLIE KEE and
DARIN ROUTIER,

Plaintiffs,

v. No. 3:98-CV-1372-T

CITY OF ROWLETT,
TEXAS, et a.,

Defendants.

**FINAL JUDGMENT**

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that Plaintiffs' claims against Defendants Chris Forsch, Jimmy Patterson, and Greg Davis are **dismissed with prejudice**.

It is **FURTHER ORDERED** and **ADJUDGED** that Plaintiffs' claims against Defendant City of Rowlett, Texas, are **dismissed with prejudice**.

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 28th day of April, 1999.

[Signed]

Robert B. Maloney
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DARLIE KEE and DARIN ROUTIER, | § | |
| | § | |
| Plaintiffs. | § | CIVIL ACTION NO. |
| | § | 3:98-CV-1372-T |
| v. | § | |
| | § | |
| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

**AFFIDAVIT OF JIMMY RAY PATTERSON**

"My name is Jimmy Ray Patterson. I am over 21 years of age and have never been convicted of a crime involving moral turpitude. I am fully competent to make this affidavit in all respects. I am a resident of Dallas County and am currently employed as a police officer for the City of Rowlett Police Department. I have an excess of 19 years experience as a police officer and hold the Advance certificates issues by the Texas Commission on Law Enforcement. I have received in excess of 1459 hours training for various law enforcement subjects including search and seizure and

criminal investigation.

"I am one of the police officers who was assigned to investigate the murder of the Routier children in Rowlett, Texas in June of 1996. I assisted several other officers in the conducting of that investigation. I am generally aware that on or about June 14, 1996, surveillance of the murder victims' grave site was conducted by police officers from another agency as part of that investigation. I was neither present nor did I take part in the conducting of that surveillance. Although I was generally aware that the surveillance was to occur as the result of discussions with other officers, I did not decide that the surveillance was to take place nor did I have any role in the decision making or planning process which culminated in the conducting of that surveillance. I had no role or authority in the decision making process nor in the supervision or the officers involved in the surveillance.

"On several occasions prior to the conducting of the surveillance, Darin Routier (Plaintiff) told me that he wanted us to do whatever we had to do to solve the murders.

"I never entered the premises of the cemetery for purposes of placing the microphone as alleged in Plaintiff's Complaint. I never participated in a video or audio interception of Plaintiffs' communications as alleged in Plaintiffs' Complaint. I was not the officer who consulted with Mr. Davis in the Dallas District Attorney's office regarding the conducting of that surveillance. I had no role, either advisory, supervisory, planning or decision making, in determining the manner in which the surveillance was to take place.

"After the surveillance was planned, Darin Routier and his wife, Darlie, invited Detective Frosch and I to attend a grave side service. This invitation occurred on June 14, 1996 – the day the surveillance was conducted.

"I am familiar with the cemetery where the surveillance

occurred. That cemetery is located in Rockwall County – outside the city limits and jurisdiction of the City of Rowlett. The cemetery is openly accessible to the public. There does not appear to be any prohibition against anyone entering the cemetery which appears to be a public place. To my knowledge, Plaintiffs had no legal right to exclude others from the cemetery premises. I personally saw news reports on local television stations which depicted the grave side service referred to in Plaintiff's Complaint. Based upon what I saw on television and news reports, it is apparent to me that television reporters were present during the grave side service and were recording that service and its participants by video and audio means. Portions of those videotapes were played on the television news within a few days of the service itself.

"In summary, I did not participate in the surveillance directly or in a supervisory or decision making capacity. Based upon the information available to me, the grave side service which is referred to in Plaintiff's Complaint, did not appear to be a private gathering.

"FURTHER, AFFIANT SAYETH NAUGHT."

_____/S/_____
Jimmy Ray Patterson

Dated: October 30, 1998
[Notary block omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DARLIE KEE and DARIN ROUTIER, | § | |
| | § | |
| Plaintiffs. | § | CIVIL ACTION NO. |
| | § | 3:98-CV-1372-T |
| v. | § | |
| | § | |
| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

**AFFIDAVIT OF CHRIS FROSCH**

"My name is Chris Frosch. I am over 21 years of age and have never been convicted of a crime involving moral turpitude. I am fully competent to make this affidavit in all respects. I am a resident of Dallas County and am currently employed as a police officer for the City of Rowlett Police Department. I have an excess of 8 years experience as a police officer and hold the basic and intermediate certificates issues by the Texas Commission on Law Enforcement. I have received in excess of 1100 hours training for various law enforcement subjects including search and seizure and

investigations.

"I am one of the police officers who was assigned to investigate the murder of the Routier children in Rowlett, Texas in June of 1996. I assisted several other officers in the conducting of that investigation. I am generally aware that on or about June 14, 1996, surveillance of the murder victims' grave site was conducted by police officers from another agency as part of that investigation. I was neither present nor did I take part in the conducting of that surveillance. Although I was generally aware that the surveillance was to occur as the result of discussions with other officers, I did not decide that the surveillance was to take place nor did I have any role in the planning or decision making which culminated in the conducting of that surveillance. I had no role or authority in the decision making process nor in the supervision of the officers involved in the surveillance.

"Prior to the conducting of the surveillance, I spoke with representatives at the funeral home which owned the cemetery where the surveillance took place. They knew of the intended surveillance and were cooperative and helpful in assisting the officers who were to conduct the surveillance. I concluded the surveillance was to be conducted with the permission of the owners of the property – the funeral home.

"I was directed to retrieve an urn from the owners of the cemetery which I understood was to be used in the surveillance. The cemetery owners were told by me of the planned surveillance and cooperated in providing the urn. I gave the urn to my supervisor who I believed gave it to the officers from the department which conducted the surveillance.

"I never entered the premises of the cemetery for purposes of placing the microphone as alleged in Plaintiff's Complaint. I never participated in a video or audio interception of Plaintiffs' communications as alleged in Plaintiffs' Complaint. I was not the

officer who consulted with Mr. Davis in the Dallas District Attorney's office regarding the conducting of the surveillance. I had no role, either advisory, supervisory, planning or decision making, in determining the manner in which the surveillance was to take place.

"It was my understanding that the surveillance in question was planned prior to any officers learning that the grave side service was to occur on June 14th. My first knowledge of the planned surveillance was from conversations occuring on or about June 10, 1996. I first learned of the Routier's intent to conduct a grave side service on June 14, 1996, when Darin and Darlie Routier invited Detective Patterson (Defendant herein) and myself to attend. To my knowledge, none of the officers assisting in the investigation knew of the planned ceremony prior to that invitation.

"I am familiar with the cemetery where the surveillance occurred. That cemetery is located in Rockwall County – outside the city limits and jurisdiction of the City of Rowlett. The cemetery is openly accessible to the public. There does not appear to be any prohibition against anyone entering the cemetery which appears to be a public place. To my knowledge, Plaintiffs had no legal right to exclude others from the cemetery premises.

"I have reviewed the video tape of the surveillance which occurred at the grave side on June 14th. During my investigation of the Routier murders, I have learned to recognize many of the members of the family. I noticed during the grave side service there were many non-family members present and milling about as well as members of the local newspaper and television media. Additionally, I saw in the surveillance video cameramen from local television stations and personally saw news reports on local television stations which depected the grave side service referred to in Plaintiff's Complaint. Based upon what I saw in the surveillance video and what I saw on television and news reports, it is apparent

to me that television reporters were present during the grave side service and were recording that service and its participants by video and audio means. Portions of those videotapes were played on the television news within a few days of the service itself.

"In summary, I did not participate in the surveillance directly or in a supervisory or decision making capacity. Based upon the information available to me, permission by the property owners had been granted in order to conduct the surveillance in question and the grave side service which is referred to in Plaintiff's Complaint, did not appear to be a private gathering.

"FURTHER, AFFIANT SAYETH NAUGHT."

_____/S/_____
Chris Frosch

Dated: November 3, 1998
[Notary block omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DARLIE KEE and DARIN ROUTIER, | § | |
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| Plaintiffs. | § | CIVIL ACTION NO. |
| | § | 3:98-CV-1372-T |
| v. | § | |
| | § | |
| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

**AFFIDAVIT OF DARLIE KEE IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF JIMMY RAY PATTERSON AND CHRIS FROSCH**

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned notary public, personally appeared DARLIE KEE, who by me being duly sworn, stated upon her oath as follows:

1. My name is DARLIE KEE. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and have personal knowledge of the facts stated herein. I am a Plaintiff in the above-referenced matter. I am the grandmother of Damon Routier and Devon Routier, Deceased.

2. On June 6, 1996, Damon Routier and Devon Routier were murdered in their home in Rowlett, Texas. Defendant Jimmy Ray Patterson was assigned by the Police Department of the City of Rowlett to conduct and to lead the investigation of the deaths of Damon and Devon Routier. Chris Frosch, a law enforcement officer hired by the City of Rowlett, Texas, also participated in the investigation into the deaths of Damon and Devon Routier.

3. On June 14, 1996, invited friends and close family members of Damon and Devon Routier attended a private prayer service conducted on private property owned by the Plaintiffs in Rowlett, Texas.

4. Unbeknownst to me or anyone else who attended the prayer service, during the private prayer service of June 14, 1996, at the grave site of Damon and Devon Routier, Defendants, the City of Rowlett, Texas, Jimmy Ray Patterson and Chris Frosch, secretly, and without permission, and without a warrant, court order, or probable cause engaged in a search and seizure and surveillance of the private prayer service by the placement of electronic eavesdropping devices and microphones besides the grave site of Damon and Devon Routier which recorded oral communications.

5. According to the statements made by U.S. Attorney Paul Coggins and others, the decision to place the electronic eavesdropping devices and hidden microphones beside the grave site of Damon and Devon Routier was authorized and known, prior to the time of the search, to be part of the investigation, and was approved by Greg Davis, Assistant District Attorney for Dallas County, Texas.

6. I learned of Mr. Davis' participation in the decision to conduct the investigation through a federal investigation conducted by U.S. Attorney Paul Coggins, after Defendants Patterson and Frosch admitted to the surveillance and search during questioning of them at the capital murder trial of Darlie Routier in January of 1997. Statements made by U.S. Attorney Paul Coggins and by reports of Mr. Coggins' investigation, indicate that Rowlett Police, Defendants Patterson and Frosch consulted with Greg Davis, Dallas County Assistant District Attorney, before the grave site service and obtained Mr. Davis' permission to conduct the investigation.

7. I first learned of the Defendants' search, seizure and surveillance at the grave site service in January of 1997, during the cross-examination of Jimmy Ray Patterson and Chris Frosch in the capital murder trial of Darlie Routier in Kerrville, Texas. It was reported to me that Jimmy Ray Patterson and Chris Frosch plead the Fifth Amendment to any further questioning because of their probable criminal conduct in the illegal bug.

8. Rowlett Police Department, the City of Rowlett, Greg Davis, Jimmy Ray Patterson, and Chris Frosch never obtained a search warrant or any authorization from a federal court or magistrate to conduct the surveillance or search and seizure at the grave site service. It was reported to me that Mr. Patterson and Mr. Frosch admitted in January of 1997 at the capital murder

trial that they did not have a warrant or court authorization to conduct the surveillance and investigation.

9. My family and I expected that our communications between each other at the private grave site service of my grandsons would be a private matter. The grave site service was not opened to the public. Specific individuals were invited to attend the grave site service to grieve for the loss of Damon and Devon Routier. The grave site services were conducted on private property where the family had purchased a burial site. Myself and the other family members, including Darin Routier, expected that our grieving conversations and statements made at the grave site service would be private. No news reporters or other general public were invited or allowed to participate in the grave site service. We could have never imagined that our oral prayers and communications to ourselves and our God would be electronically monitored by the Defendants. We expected that our prayers to our God and our oral communications during this private time of grieving for the deaths of two children would be private. We specifically requested that the public and news media not be present during the grave site service so that our prayers and conversations would be personal and private. The Defendants were not invited to attend the burial services.

10. My family and I were shocked to learn in January of 1997, that the Defendants had secretly placed microphones and electronic eavesdropping devices at the grave site service and had monitored electronically our conversations and prayers at the private service. We anticipated and expected that our conversations at the grave site service would be a private matter between close family members and close friends of the family who had been invited to participate in the service. No outsiders or persons unassociated closely with the family were invited to attend the grave site service.

11. No one, including the funeral home where the grave site services were conducted, permitted or agreed to the Defendants' electronic surveillance and search of the conversations made at the grave site service.

12. Defendants Jimmy Ray Patterson, Chris Frosch and the City of Rowlett did not request or participate in the grave site service. The Defendants did not request permission to tape record or conduct electronic surveillance of the statements made by individuals at the grave site service.

13. According to the sworn statements made by the Defendants at the capital murder trial of Darlie Kee, no Defendant ever attempted nor obtained a warrant or court permission to intercept any oral communication made at the grave site service, or to conduct any electronic surveillance and search of the statements made and conduct of the participants at the grave site service.

14. I have been told and news reports have indicated that as part of the criminal investigation, the Assistant District Attorney, Greg Davis, approved the search, seizure and surveillance by Jimmy Ray Patterson and Chris Frosch at the grave site services as part of a checklist of items of investigation that was to be done. Jimmy Ray Patterson and Chris Frosch have admitted that their proposed investigation of placing hidden microphones at the grave site of the graves of Damon and Devon Routier in order to intercept oral communications at the grave site service was done with the approval and consent of Assistant District Attorney Greg Davis."

FURTHER, AFFIANT SAYETH NAUGHT.

/S/
DARLIE KEE

Dated: December 20, 1998
Notary block omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DARLIE KEE and DARIN ROUTIER, | § | |
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| Plaintiffs. | § | CIVIL ACTION NO. |
| | § | 3:98-CV-1372-T |
| v. | § | |
| | § | |
| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

AFFIDAVIT OF DARLIE KEE IN RESPONSE TO
MOTION FOR SUMMARY JUDGMENT OF GREG DAVIS

| | |
|---|---|
| STATE OF TEXAS | § |
| | § |
| COUNTY OF DALLAS | § |

BEFORE ME, the undersigned notary public, personally appeared DARLIE KEE, who by me being duly sworn, stated upon her oath as follows:

1. My name is DARLIE KEE. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and have personal knowledge of the facts stated herein. I am a Plaintiff in the above-referenced matter. I am the grandmother of Damon Routier and Devon Routier, Deceased.

2. On June 6, 1996, Damon Routier and Devon Routier were murdered in their home in Rowlett, Texas. Defendant Jimmy Ray Patterson was assigned by the Police Department of the City of Rowlett to conduct and to lead the investigation of the deaths of Damon and Devon Routier. Chris Frosch, a law enforcement officer hired by the City of Rowlett, Texas, also participated in the investigation into the deaths of Damon and Devon Routier.

3. On June 14, 1996, invited friends and close family members of Damon and Devon Routier attended a private prayer service conducted on private property owned by the Plaintiffs in Rowlett, Texas.

4. Unbeknownst to me or anyone else who attended the prayer service, during the private prayer service of June 14, 1996, at the grave site of Damon and Devon Routier, Defendants, the City of Rowlett, Texas, Jimmy Ray Patterson and Chris Frosch, secretly, and without permission, and without a warrant, court order, or probable cause engaged in a search and seizure and surveillance of the private prayer service by the placement of electronic eavesdropping devices and microphones besides the grave site of Damon and Devon Routier which recorded oral communications.

5. According to the statements made by U.S. Attorney Paul Coggins and others, the decision to place the electronic eavesdropping devices and hidden microphones beside the grave site of Damon and Devon Routier was authorized and known, prior to the time of the search, to be part of the

investigation, and was approved by Greg Davis, Assistant District Attorney for Dallas County, Texas.

6. I learned of Mr. Davis' participation in the decision to conduct the investigation through a federal investigation conducted by U.S. Attorney Paul Coggins, after Defendants Patterson and Frosch admitted to the surveillance and search during questioning of them at the capital murder trial of Darlie Routier in January of 1997. Statements made by U.S. Attorney Paul Coggins and by reports of Mr. Coggins' investigation, indicate that Rowlett Police, Defendants Patterson and Frosch consulted with Greg Davis, Dallas County Assistant District Attorney, before the grave site service and obtained Mr. Davis' permission to conduct the investigation.

7. I first learned of the Defendants' search, seizure and surveillance at the grave site service in January of 1997, during the cross-examination of Jimmy Ray Patterson and Chris Frosch in the capital murder trial of Darlie Routier in Kerrville, Texas. It was reported to me that Jimmy Ray Patterson and Chris Frosch plead the Fifth Amendment to any further questioning because of their probable criminal conduct in the illegal bug.

8. Rowlett Police Department, the City of Rowlett, Greg Davis, Jimmy Ray Patterson, and Chris Frosch never obtained a search warrant or any authorization from a federal court or magistrate to conduct the surveillance or search and seizure at the grave site service. It was reported to me that Mr. Patterson and Mr. Frosch admitted in January of 1997 at the capital murder trial that they did not have a warrant or court authorization to conduct the surveillance and investigation.

9. My family and I expected that our communications between each other at the private grave site service of my grandsons would be a private matter. The grave site service was not opened to the public. Specific individuals were invited to

attend the grave site service to grieve for the loss of Damon and Devon Routier. The grave site services were conducted on private property where the family had purchased a burial site. Myself and the other family members, including Darin Routier, expected that our grieving conversations and statements made at the grave site service would be private. No news reporters or other general public were invited or allowed to participate in the grave site service. We could have never imagined that our oral prayers and communications to ourselves and our God would be electronically monitored by the Defendants. We expected that our prayers to our God and our oral communications during this private time of grieving for the deaths of two children would be private. We specifically requested that the public and news media not be present during the grave site service so that our prayers and conversations would be personal and private. The Defendants were not invited to attend the burial services.

10. My family and I were shocked to learn in January of 1997, that the Defendants had secretly placed microphones and electronic eavesdropping devices at the grave site service and had monitored electronically our conversations and prayers at the private service. We anticipated and expected that our conversations at the grave site service would be a private matter between close family members and close friends of the family who had been invited to participate in the service. No outsiders or persons unassociated closely with the family were invited to attend the grave site service.

11. No one, including the funeral home where the grave site services were conducted, permitted or agreed to the Defendants' electronic surveillance and search of the conversations made at the grave site service.

12. Defendants Jimmy Ray Patterson, Chris Frosch and the City of Rowlett did not request or participate in the grave site

service. The Defendants did not request permission to tape record or conduct electronic surveillance of the statements made by individuals at the grave site service.

13. According to the sworn statements made by the Defendants at the capital murder trial of Darlie Kee, no Defendant ever attempted nor obtained a warrant or court permission to intercept any oral communication made at the grave site service, or to conduct any electronic surveillance and search of the statements made and conduct of the participants at the grave site service.

14. I have been told and news reports have indicated that as part of the criminal investigation, the Assistant District Attorney, Greg Davis, approved the search, seizure and surveillance by Jimmy Ray Patterson and Chris Frosch at the grave site services as part of a checklist of items of investigation that was to be done. Jimmy Ray Patterson and Chris Frosch have admitted that their proposed investigation of placing hidden microphones at the grave site of the graves of Damon and Devon Routier in order to intercept oral communications at the grave site service was done with the approval and consent of Assistant District Attorney Greg Davis."

FURTHER, AFFIANT SAYETH NAUGHT.

/S/
DARLIE KEE

Dated: December 20, 1998
[Notary block omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| DARLIE KEE and DARIN ROUTIER, | § | |
| | § | |
| Plaintiffs. | § | CIVIL ACTION NO. |
| | § | 3:98-CV-1372-T |
| v. | § | |
| | § | |
| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

AFFIDAVIT OF DARIN ROUTIER IN RESPONSE
TO MOTION FOR SUMMARY JUDGMENT OF
JIMMY RAY PATTERSON AND CHRIS FROSCH

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned notary public, personally appeared DARIN ROUTIER, who by me being duly sworn, stated upon his oath as follows:

1. My name is DARIN ROUTIER. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and have personal knowledge of the facts stated herein. I am a Plaintiff in the above-referenced matter. I am the father of Damon Routier and Devon Routier, deceased.

2. On June 6, 1996, Damon Routier and Devon Routier were murdered in their home in Rowlett, Texas. Defendant Jimmy Ray Patterson was assigned by the Police Department of the City of Rowlett to conduct and to lead the investigation of the deaths of Damon and Devon Routier. Chris Frosch, a law enforcement officer hired by the City of Rowlett, Texas, also participated in the investigation into the deaths of Damon and Devon Routier.

3. On June 14, 1996, invited friends and close family members of Damon and Devon Routier attended a private prayer service conducted on private property owned by the Plaintiffs in Rowlett, Texas.

4. Unbeknownst to me or anyone else who attended the prayer service, during the private prayer service of June 14, 1996, at the grave site of Damon and Devon Routier, Defendants, the City of Rowlett, Texas, Jimmy Ray Patterson and Chris Frosch, secretly, and without permission, and without a warrant, court order, or probable cause engaged in a search and seizure and surveillance of the private prayer service by the placement of electronic eavesdropping devices and microphones besides the grave site of Damon and Devon Routier which recorded oral communications.

5. According to the statements made by U.S. Attorney Paul Coggins and others, the decision to place the electronic eavesdropping devices and hidden microphones beside the grave site of Damon and Devon Routier was authorized and known, prior to the time of the search, to be part of the investigation, and was approved by Greg Davis, Assistant District Attorney for Dallas County, Texas.

6. I learned of Mr. Davis' participation in the decision to conduct the investigation through a federal investigation conducted by U.S. Attorney Paul Coggins, after Defendants Patterson and Frosch admitted to the surveillance and search during questioning of them at the capital murder trial of Darlie Routier in January of 1997. Statements made by U.S. Attorney Paul Coggins and by reports of Mr. Coggins' investigation, indicate that Rowlett Police, Defendants Patterson and Frosch consulted with Greg Davis, Dallas County Assistant District Attorney, before the grave site service and obtained Mr. Davis' permission to conduct the investigation.

7. I first learned of the Defendants' search, seizure and surveillance at the grave site service in January of 1997, during the cross-examination of Jimmy Ray Patterson and Chris Frosch in the capital murder trial of Darlie Routier in Kerrville, Texas. It was reported to me that Jimmy Ray Patterson and Chris Frosch plead the Fifth Amendment to any further questioning because of their probable criminal conduct in the illegal bug.

8. Rowlett Police Department, the City of Rowlett, Greg Davis, Jimmy Ray Patterson, and Chris Frosch never obtained a search warrant or any authorization from a federal court or magistrate to conduct the surveillance or search and seizure at the grave site service. It was reported to me that Mr. Patterson and Mr. Frosch admitted in January of 1997 at the capital murder

trial that they did not have a warrant or court authorization to conduct the surveillance and investigation.

9. My family and I expected that our communications between each other at the private grave site service of my sons would be a private matter. The grave site service was not opened to the public. Specific individuals were invited to attend the grave site service to grieve for the loss of Damon and Devon Routier. The grave site services were conducted on private property where the family had purchased a burial site. Myself and the other family members, including Darlie Kee, expected that our grieving conversations and statements made at the grave site service would be private. No news reporters or other general public were invited or allowed to participate in the grave site service. We could have never imagined that our oral prayers and communications to ourselves and our God would be electronically monitored by the Defendants. We expected that our prayers to our God and our oral communications during this private time of grieving for the deaths of two children would be private. We specifically requested that the public and news media not be present during the grave site service so that our prayers and conversations would be personal and private. The Defendants were not invited to attend the burial services.

10. My family and I were shocked to learn in January of 1997 that the Defendants had secretly placed microphones and electronic eavesdropping devices at the grave site service and had monitored electronically our conversations and prayers at the private service. We anticipated and expected that our conversations at the grave site service would be a private matter between close family members and close friends of the family who had been invited to participate in the service. No outsiders or persons unassociated closely with the family were invited to attend the grave site service.

11. No one, including the funeral home where the grave site services were conducted, permitted or agreed to the Defendants' electronic surveillance and search of the conversations made at the grave site service.

12. Defendants Jimmy Ray Patterson, Chris Frosch and the City of Rowlett did not request or participate in the grave site service. The Defendants did not request permission to tape record or conduct electronic surveillance of the statements made by individuals at the grave site service.

13. According to the sworn statements made by the Defendants at the capital murder trial of Darlie Kee, no Defendant ever attempted nor obtained a warrant or court permission to intercept any oral communication made at the grave site service, or to conduct any electronic surveillance and search of the statements made and conduct of the participants at the grave site service.

14. I have been told and news reports have indicated that as part of the criminal investigation, the Assistant District Attorney, Greg Davis, approved the search, seizure and surveillance by Jimmy Ray Patterson and Chris Frosch at the grave site services as part of a checklist of items of investigation that was to be done. Jimmy Ray Patterson and Chris Frosch have admitted that their proposed investigation of placing hidden microphones at the grave site of the graves of Damon and Devon Routier in order to intercept oral communications at the grave site service was done with the approval and consent of Assistant District Attorney Greg Davis."

FURTHER, AFFIANT SAYETH NAUGHT.

_____

DARIN ROUTIER

December 20, 1998
[Notary block omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DARLIE KEE and DARIN ROUTIER, | § | |
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| Plaintiffs. | § | CIVIL ACTION NO. |
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| CITY OF ROLWETT, TEXAS, JIMMY RAY PATTERSON, CHRIS FROSCH, and GREG DAVIS, ASSISTANT DISTRICT ATTORNEY FOR DALLAS COUNTY, | § | |
| | § | |
| Defendants. | § | |

AFFIDAVIT OF DARIN ROUTIER
IN RESPONSE TO MOTION FOR SUMMARY
JUDGMENT OF GREG DAVIS

| | |
|---|---|
| STATE OF TEXAS | § |
| | § |
| COUNTY OF DALLAS | § |

BEFORE ME, the undersigned notary public, personally appeared DARIN ROUTIER, who by me being duly sworn, stated upon his oath as follows:

1. My name is DARIN ROUTIER. I am over twenty-one years of age, of sound mind, capable of making this affidavit, and have personal knowledge of the facts stated herein. I am a Plaintiff in the above-referenced matter. I am the father of Damon Routier and Devon Routier, deceased.

2. On June 6, 1996, Damon Routier and Devon Routier were murdered in their home in Rowlett, Texas. Defendant Jimmy Ray Patterson was assigned by the Police Department of the City of Rowlett to conduct and to lead the investigation of the deaths of Damon and Devon Routier. Chris Frosch, a law enforcement officer hired by the City of Rowlett, Texas, also participated in the investigation into the deaths of Damon and Devon Routier.

3. On June 14, 1996, invited friends and close family members of Damon and Devon Routier attended a private prayer service conducted on private property owned by the Plaintiffs in Rowlett, Texas.

4. Unbeknownst to me or anyone else who attended the prayer service, during the private prayer service of June 14, 1996, at the grave site of Damon and Devon Routier, Defendants, the City of Rowlett, Texas, Jimmy Ray Patterson and Chris Frosch, secretly, and without permission, and without a warrant, court order, or probable cause engaged in a search and seizure and surveillance of the private prayer service by the placement of electronic eavesdropping devices and microphones besides the grave site of Damon and Devon Routier which recorded oral communications.

5. According to the statements made by U.S. Attorney Paul Coggins and others, the decision to place the electronic eavesdropping devices and hidden microphones beside the grave site of Damon and Devon Routier was authorized and known, prior to the time of the search, to be part of the investigation, and was approved by Greg Davis, Assistant District Attorney for Dallas County, Texas.

6. I learned of Mr. Davis' participation in the decision to conduct the investigation through a federal investigation conducted by U.S. Attorney Paul Coggins, after Defendants Patterson and Frosch admitted to the surveillance and search during questioning of them at the capital murder trial of Darlie Routier in January of 1997. Statements made by U.S. Attorney Paul Coggins and by reports of Mr. Coggins' investigation, indicate that Rowlett Police, Defendants Patterson and Frosch consulted with Greg Davis, Dallas County Assistant District Attorney, before the grave site service and obtained Mr. Davis' permission to conduct the investigation.

7. I first learned of the Defendants' search, seizure and surveillance at the grave site service in January of 1997, during the cross-examination of Jimmy Ray Patterson and Chris Frosch in the capital murder trial of Darlie Routier in Kerrville, Texas. It was reported to me that Jimmy Ray Patterson and Chris Frosch plead the Fifth Amendment to any further questioning because of their probable criminal conduct in the illegal bug.

8. Rowlett Police Department, the City of Rowlett, Greg Davis, Jimmy Ray Patterson, and Chris Frosch never obtained a search warrant or any authorization from a federal court or magistrate to conduct the surveillance or search and seizure at the grave site service. It was reported to me that Mr. Patterson and Mr. Frosch admitted in January of 1997 at the capital murder

trial that they did not have a warrant or court authorization to conduct the surveillance and investigation.

9. My family and I expected that our communications between each other at the private grave site service of my sons would be a private matter. The grave site service was not opened to the public. Specific individuals were invited to attend the grave site service to grieve for the loss of Damon and Devon Routier. The grave site services were conducted on private property where the family had purchased a burial site. Myself and the other family members, including Darlie Kee, expected that our grieving conversations and statements made at the grave site service would be private. No news reporters or other general public were invited or allowed to participate in the grave site service. We could have never imagined that our oral prayers and communications to ourselves and our God would be electronically monitored by the Defendants. We expected that our prayers to our God and our oral communications during this private time of grieving for the deaths of two children would be private. We specifically requested that the public and news media not be present during the grave site service so that our prayers and conversations would be personal and private. The Defendants were not invited to attend the burial services.

10. My family and I were shocked to learn in January of 1997 that the Defendants had secretly placed microphones and electronic eavesdropping devices at the grave site service and had monitored electronically our conversations and prayers at the private service. We anticipated and expected that our conversations at the grave site service would be a private matter between close family members and close friends of the family who had been invited to participate in the service. No outsiders or persons unassociated closely with the family were invited to attend the grave site service.

11. No one, including the funeral home where the grave site services were conducted, permitted or agreed to the Defendants' electronic surveillance and search of the conversations made at the grave site service. 12. Defendants Jimmy Ray Patterson, Chris Frosch and the City of Rowlett did not request or participate in the grave site service. The Defendants did not request permission to tape record or conduct electronic surveillance of the statements made by individuals at the grave site service.

13. According to the sworn statements made by the Defendants at the capital murder trial of Darlie Kee, no Defendant ever attempted nor obtained a warrant or court permission to intercept any oral communication made at the grave site service, or to conduct any electronic surveillance and search of the statements made and conduct of the participants at the grave site service.

14. I have been told and news reports have indicated that as part of the criminal investigation, the Assistant District Attorney, Greg Davis, approved the search, seizure and surveillance by Jimmy Ray Patterson and Chris Frosch at the grave site services as part of a checklist of items of investigation that was to be done. Jimmy Ray Patterson and Chris Frosch have admitted that their proposed investigation of placing hidden microphones at the grave site of the graves of Damon and Devon Routier in order to intercept oral communications at the grave site service was done with the approval and consent of Assistant District Attorney Greg Davis."

FURTHER, AFFIANT SAYETH NAUGHT.

_____

DARIN ROUTIER

Dated: December 20, 1998
[Notary block omitted]

Excerpts from transcript of criminal trial proceedings held in Kerrville, Texas on January 27, 1997 in *State of Texas v. Darlie Routier*:

JIMMY RAY PATTERSON,

was called as a witness, for the Defense, having been first duly sworn by the Court to speak the truth, the whole truth, and nothing but the truth, testified in open court, as follows:

DIRECT EXAMINATION

* * * *

BY MR. DOUGLAS D. MULDER:

Q. Would you tell the jury your name, please, sir?

A. Jimmy Ray Patterson.

Q. Mr. Patterson, you are a police officer?

A. Yes, sir.

Q. And, you work for Rowlett Police Department?

A. Yes, sir, I do.

Q. And what was your position, vis-a-vis, the Darlie Routier case?

A. I was the lead Detective in the case.

* * * *

Q. Okay. Let me ask you... There was a viewing of the body, is that right? Of the youngsters body?

A. Yes, sir.

Q. Okay. And after that, there was a funeral the next day?

A. Yes, sir.

Q. Did you attend the funeral?

A. Yes, sir.

Q. Okay. and then I believe, on the 14th, there was a prayer service at the grave side, were you aware of that?

A. Yes, sir.

Q. Okay. And, did you attend that?

A. No, sir.

Q. Okay. Did you place a microphone by the grave side for the prayer service, so that you could record and intercept things that were said at the grave side?

A. I did not.

Q. Who did?

A. Two other Detectives.

Q. Why did they do that?

A. In case someone went up there and made a confession about what happened.

Q. Did you realize that that was – was that done with your knowledge?

A. Yes, sir.

Q. Did you know that that is a violation of Federal Law?

MR. GREG DAVIS: I'll object to that. That calls for some legal conclusion.

THE COURT: I will stain the objection. [*sic* - error in original]

MR. DOUGLAS D. MULDER: Okay.

BY MR. DOUGLAS D. MULDER:

Q. But you are here telling this Jury, that you folks put microphones there at the grave side, to monitor the conversations of the other people who had gone there to pray, and to grieve at the passing of these two children?

A. Yes, sir.

Q. And recorded all that?

A. Yes, sir.

Q. And these were hidden, so that the people couldn't find them. I mean, it was designed to be done surreptitiously was it not?

A. So that they couldn't – that they didn't see it, that's right.

Q. And you would record those private moments, is that right?

A. Yes, we did.

Q. Did your oh – who all knew about this besides you?

A. Detective Frosch.

Q. And who else?

A. The two Detectives that set it up.

Q. Okay. But you were part of it. It was done, not only with your knowledge but at your insistence, wasn't it?

A. I didn't insist on their doing it.

Q. But you – all got together and thought it would be a good idea?

A. Yes sir.

Q. Okay.

MR. DOUGLAS D. MULDER: Mark this please.

(Whereupon, the following mentioned item was marked for identification only as Defense Exhibit 77, after which time the proceedings were resumed on the record in open court, as follows:)

BY MR. DOUGLAS D. MULDER:

Q. Let me hands you what a has been marked for identification purpose as State's Exhibit Number 77. I'll ask you if that is Sergeant Nabors report?

A. Yes, sir, it is.

Q. Does that refresh your memory?

A. Well –

Q. Did the district attorneys office know that you had surreptitiously planted some microphones at the grave side to monitor those private conversations?

THE COURT: All right bring the jury in, please.

(Whereupon, the jury was returned to the Courtroom, and the Proceedings were Resumed on the record, In open court, in the Presence and hearing of the Defendant, as follows:)

THE COURT: All right be seated, please. Let the record reflect that all parties in the trial are present and the jury is seated.

Mr. Mulder.

MR. DOUGLAS D. MULDER: Yes, sir, your Honor.

DIRECT EXAMINATION (Resumed)

BY MR. DOUGLAS D. MULDER:

Q. Officer Patterson, I'm going to get into where we were when we left off in a minute, but just so that you and I are on the same wave length. Do you understand what the federal law is, as regards to monitoring private phone conversations?

A. No, sir.

Q. Weren't you a narcotics officer? Didn't you work drugs?

A. Yes, sir.

Q. Well, in that capacity didn't you have occasion to get wire taps?

A. Well, if your saying that I violated some law, then I'm not going to say anything else about it.

Q. Well your going to answer my questions.

THE COURT: Well –

BY MR. DOUGLAS D. MULDER:

Q. Are you going to take the fifth, is that what you are going to do?

A. If you are saying that I violated some state or federal law then I'm not going to answer it until I have legal counsel.

Q. Well, I suspect you better get legal counsel then, because I am suggesting to you that that is exactly what you did.

MR. REG DAVIS: Object to him suggesting anything. The officer has already stated that he doesn't know.

THE COURT: Sustained

MR. DOUGLAS D. MULDER: Judge, it doesn't make any difference to me whether you warn the man or not. The Court knows the law, and it's a violation of state and federal law.

THE COURT: Mr. Mulder, I know the law, and –

MR. DOUGLAS D. MULDER: This is a federal felony.

THE COURT: Mr. Mulder, please, please. Officer Patterson is a law enforcement officer and he is presumed to know the law in Texas.

MR. DOUGLAS D. MULDER: Yes, sir.

THE COURT: I have advised him of his rights in this regard. And, you do have a right, under the fifth amendment of the Constitution of the United States, not to say anything that might tend to incriminate you in any way. And, you certainly understand all of that, do you not?

THE WITNESS: yes, sir.

THE COURT: So, you are an experienced law enforcement officer, and you know all of the other people's rights, you know what the Miranda warnings are, do you not?

THE WITNESS: I do.

THE COURT: Well then, if you know what the Miranda warnings are, then I think that speaks for itself. You understand what you can do, and what you can't do. Do you need any further counseling do you think? Any explanation of what your rights are?

THE WITNESS: No sir.

THE COURT: Okay. Fine. I think we have covered that. So ask your question. If he wants to answer it he will, if he does not, then he can invoke the fifth amendment.

UNITED STATES CONST., AMEND IV (1791):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONST., AMEND. XIV (1868):

> *Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C.§ 2511, *et. seq.*

United States Code Annotated
Title 18, Crimes and Criminal Procedure
Part I — Crimes
Chapter 119 — Wire and Electronic Communications Interception and Interception of Oral Communications

§2511. Interception and Disclosure of Wire, Oral or Electronic Communications Prohibited.

(1) Except as otherwise specifically provided in this chapter any person who —

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when —

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B)

obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)

(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516 and 2518 of this chapter,

(ii) knowing or having reason to know that the information was obtained through the interception

of such a communication in connection with a criminal investigation,

(iii) having obtained or received the information in connection with a criminal investigation, and

(iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2) . . .

(3) . . .

(4) (a) Except as provided in paragraph (b) of this subsection or in subsection (5); whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

(b) . . .

(5) . . .

§2516. Authorization for Interception of Wire, Oral, or Electronic Communications

(1) . . .

§2517. Authorization for Disclosure and Use of Intercepted Wire, Oral, or Electronic Communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) . . .

(3) . . .

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§2518. Procedure for Interception of Wire, Oral, or Electronic Communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal Court within

such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to Section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period long than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been

made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) . . .

(8) (a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. . .

(9) . . .

(10) . . .

(11) . . .

(12) . . .

§2519. Reports Concerning Intercepted Wire, Oral, and Electronic Communications.

. . . .

§2520. Recovery of Civil Damages Authorized.

(a) In general. — Except as provided in Section 2511(2)(a)(ii), any person whose wire, oral, or electronic

communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. — In an action under this section, appropriate relief includes —

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and,

(3) a reasonable attorney's fees and other litigation costs reasonably incurred.

(c) Computation of damages. — (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication . . .

(2) In any other action under this section, the court may assess as damages whichever is the greater of —

(A) the sum of the actual damages suffered by the Plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense. — A good faith reliance on —

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. –A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.